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European Architect Law

Towards a New Design

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European Architect Law

Towards a New Design

PROEFSCHRIFT

TER VERKRIJGING VAN DE GRAAD VAN DOCTOR
AAN DE UNIVERSITEIT VAN TILBURG,
OP GEZAG VAN DE RECHTOR MAGNIFICUS,
PROF. DR. PH. EIJLANDER,
IN HET OPENBAAR TE VERDEDIGEN TEN OVERSTAAN VAN
EEN DOOR HET COLLEGE VOOR PROMOTIES AANGEWEZEN COMMISSIE
IN DE AULA VAN DE UNIVERSITEIT
OP WOENSDAG 17 DECEMBER 2008 OM 16.15 UUR

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STÉPHANIE VAN GULIJK
GEBOREN OP 5 APRIL 1980 TE GILZE EN RIJEN

Promotores: Prof.mr. J.M. Barendrecht
Prof.mr. M.A.M.C. van den Berg

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Dankwoord

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Tilburg, 23 oktober 2008

CHAPTER 1 Introduction

1. Dealing with Tensions in Architect Law

The legal relationship between architects and clients suffers from two basic tensions. First, the market for design of buildings is not the exclusive domain of architects anymore. The position of European architects in the construction process is weakening. This is because professionals from other disciplines, such as building contractors, (technical) advisors, and real estate managers, have gradually encroached on the architect's core activities. As a result, many new forms of contract have been developed in the construction industry. For example, building contractors may offer turn key arrangements, in which they agree to design and build a structure. Furthermore, engineering and consultancy firms may take care of the design and team up with other professionals to do the actual construction work. Sophisticated clients may have their own design teams and hire a building contractor to set up the edifice.[1]

These market models no longer fit the traditional design contract[2] that, usually, departs from the idea that an architect designs a structure (mostly a building) that is fit for its purpose and subsequently supervises the realisation of the design by the building contractor.[3] The development of these other market models may be impeded by regulation requiring clients to hire an architect when they initiate building activities. In some European countries, clients are obliged to hire an architect to provide a design. Architects in these countries are said to have a professional monopoly because clients can not initiate building activities without involving an architect in this process to provide the design.

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1 See for these changing patterns for instance, Chao-Duivis and Koning, 2001; Janssen, 1997 (a); ONRI, 2005; Chao-Duivis and Weijnen, 1999; FIDIC conference 2004 (http://www1.fidic.org/conference/2004); *Centre d'études d'assurances*, 2004.

2 The traditional design contract governs the relationship between architects and clients. It covers their mutual rights and obligations, such as the architect's fee, the time of delivery of the works, and the liability of architects in case of non-performance of one of more of their duties. See, for example, Van den Berg, Bregman, and Chao-Duivis, 2007, pp. 409f; Chao-Duivis, Koning, and Leijgraaf, 2004, p. 29; Chao-Duivis and Koning, 2001, pp. 43f; Furst and Ramsey, 2006, no. 1-024; Deketelaere, Schoups, and Verbeke, 2004, nos. V. 112-V. 116; Saint-Alary and Saint-Alary-Houin, 2003, p. 143; Thode/Wirth/Kuffer, 2004, § 4, nos 4f; Uff, 2005, p. 299.

3 Designing is the initial stage of a construction process in which an architect designs a structure (mostly a building) on behalf of the client. During this design stage, architects can also perform other services than providing a design, such as supervising the realisation of the design by the building contractor or assisting the client at the tender in order to arrive at a construction contract.

Secondly, there is another tension in the legal relationship between architects and clients. Designing buildings is a low yield/high risk endeavour. Usually, the design fee will be in the order of 10 to 15 % of the value of the building.[4] If the obligations of architects under the design contract are not performed well, they are thus exposed to liabilities that can easily be 10 to 20 times their fee. Depending on the number of assignments per year, architects may have to pay damages in the order of several times their yearly income.

This liability of architects towards clients may cause serious financial problems to architects. In some countries, architects can limit (part of) their liability towards clients, for instance by means of limitation clauses in standard conditions[5]. However, these limitation clauses often not allow limiting the total amount of damages of architects. The liability problem of architects is not solved then. Architects may still get bankrupt because they are not capable to bear the client's damages. Therefore, in some countries, architects are obliged to take out professional liability insurance to cover the client's financial damages.[6]

Detailed comparative research on design contracts in which I participated[7] shows that rule makers have difficulties in dealing with these two tensions. In Europe, considerable differences exist regarding the national rules that apply to the contractual relationship between architects and clients.[8] The regulation issues[9] arising from these differences are hotly

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4 The design fee is usually based on the costs of construction as has been established in Article 57 SR 1997 and Articles 51, 52 DNR 2005 for example. See Vleemink and Dijkstra, 2004, p. 4f; Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 285f; Van Wijngaarden and Chao-Duivis, 2004-10, nos. 529f.

5 In this study, I will describe standard conditions as a standard document that governs the contractual relationship between architects and clients and can be applied by these contracting parties to design contracts.

6 For publications regarding the problems that rise in the field of architect liability see, for example, ONRI, 2005; *Centre d'études d'assurances*, 2004; Janssen, 1997(a); FIDIC conference 2004 (http://www1.fidic.org/conference/2004); Jones, 2007.

7 In 2006, a comparative study on service contracts was completed that resulted in the Principles of European Law on Service Contracts (PEL SC). Basically, a number of principles were drafted for six different types of service contracts. One of these service contracts are design contracts, the comparative study of which I participated in; Van Gulijk, 2006; Barendrecht, 2008. See also Chapter 2, Section 3.

8 See also Busch, 2007. Busch argues: "(…) *ist der Markt für Architektendienstleistungen in den meisten Mitgliedstaaten der Europaïschen Union durch einen relative hohen Regulierungsgrad geprägt*." (p. 297) and "*Die rechtsvergleichende Forschungslage im Recht der baubezogenen Dienstleistungen und insbesondere im Architektenvertragsrecht ist noch unterentwickelt*." (p. 298) and "(…) *fehlen im Bauvertrags- und Architektenrecht jedoch bis heute bereichsspecifische Harmonisierungsmassnahmen*." (p. 307) and "*Um die skizzierten Unvollkommenheiten des Marktes für Architektendienstleistungen zu beheben, setzen die Mitgliedstaaten ein ganzes Arsenal von Reglementierungen ein. Zu differenzieren ist dabei zwischen Regelungen, die den Zugang zum Architektenberuf betreffen und solchen, die der Regulierung der Berufsausübung dienen*." (p. 302) and "*Die skizzierten Unterschiede im Recht*

debated in the European countries.[10] In the Netherlands, for instance, the *Bond van Nederlandse Architecten* (The Royal Institute of Dutch Architects, BNA)[11] argues that architects are no longer professionally relevant as they are becoming one of the many consultants assisting clients.[12] Furthermore, English professional organisations of architects argue that architects have an increasingly marginalised role nowadays. It is suggested that architect law should be restructured in order to solve the current unrest among English architects.[13] In France as well, the *Ordre des Architectes* (Architect's Order) encourages French architects to seriously think about the future and strengthen their profession.[14]

The most intense discussion arguably goes on in Belgium. This can be ascribed to the complex combination of rules that applies to Belgian architects. To begin with, Belgian clients are obliged to hire an architect to design a structure. This gives architects a strong position in the construction industry. But to Belgian architects a complex set of liability rules apply compared to other European countries as they may be liable towards the client up to ten years after the client's approval of the design. This is even more problematic now that Belgian architects are not allowed to limit this liability in standard conditions, as is often allowed in other European countries. Moreover, Belgian architects are under a legal obligation to insure

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des Mitgliedstaaten erschweren die Verwirklichung eines funktionsfähigen Binnenmarktes für Architektendiesnstleistungen." (p. 305).

9 See Section 2 of this Chapter for a description of the notion regulation issues.

10 Recently, April 2008, the Architect's Council of Europe organised an international conference on the importance of architecture and the position of architects in Europe, which was called Designing for the Future: The Market and Quality of Life. See http://www.ace-cae.org.

11 The BNA was founded in 1908 in order to realise public protection of the architect's title and profession. See Chapter 3, section 2.

12 *BladNA*, no. 10, 2006, p. 8; *BladNA*, no. 10, 2005, pp. 6-7.

13 RIBA, 2005; *BladNA*, no. 1/2, 2006, p. 3; See http://www.bdonline.co.uk; www.aaruk.info; http://www.arb.org.uk; http://www.acenet.co.uk. Recently, ACE launched the ACE Construction Liability Campaign in order to bring about proportionate liability for the UK construction industry because the existing system of joint and several liability would place a "grossly unfair and onerous economic burden" upon the industry (see http://www.acenet.co.uk/index.cfm?page=179, accessed on 30 June 2008). See also Chao-Duivis, 2008, p. 3. Furthermore, the RIBA has launched a restructured Architects for Change plan in April 2008 (see http//www.architecture.com/ NewsAndPress/Home.aspx, accessed on 30 June 2008). See for more on proportionate liability reform and insurability of the risk of damages in the UK for instance Jones, 2007.

14 *Ordre des Architectes*, 2005, p. 67. Therefore, the *Conseil National de l'Ordre des Architectes* (National Council of the Association for Architects[14], CNOA), announced a national debate for 2007 on the role of architects in society, under the title *La France de Demain a Besoin des Architectes* (Tomorrow's France Needs Architects). *Projet d'architecture* 2007 (http://www.architecture2007.com); http://www.architectes.org/actualites/print.php?id= 1025 (accessed on 24 April 2006).

their severe professional liability towards the client.[15] Together these four issues lead to a rigid combination of liability rules for architects that is not found in other European countries.[16] Belgian architects are therefore said to be outsiders in European architect law.[17] The current position of architects was called an "explosive cocktail" because of the complex way of organising the professional activities of architects.[18]

2. Research Question

So there are two basic tensions in the legal relationship between architects and clients that have been debated in several European countries. First, the development of other market models instead of the traditional design contract may be impeded by regulation requiring clients to hire an architect when they initiate building activities. Second, architects struggle with high liability risks and the European rules that deal with this architect liability differ to a great extent.

As shown in Section 1, Member States have problems with regulating these two tensions. I identified four regulation issues that particularly deal with establishing rules to govern the two tensions mentioned. These four regulation issues are the following: market entry regulation, architect liability, limitation of architect liability, and professional liability insurance. I have chosen to apply the notion *regulation issues* because these issues predominantly determine the legal relationship between clients and architects.

As we will see, each of these four regulation issues has two or more leading options in which it is regulated in the European countries. Although there may be more options, I will focus on these leading ones. The four regulation issues will be examined in five European countries: the Netherlands, Belgium, France, Germany, and England. These countries were chosen because together they resemble many other European legal systems.[19] Moreover, they well reflect the leading regulation options I have found: more than one country stands for one regulation option.

In this study I will examine *which combination of regulation options on market entry, architect liability, limitation of architect liability, and insurance is optimal in*

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15 See for instance http://www.ordredesarchitectes.be/nl/index.htm (accessed on 7 July 2008). See further Chapter 12 of this study.

16 *Centre d'études d'assurances* (Study Center on Insurances), 2004.

17 *Centre d'études d'assurances*, 2004; http://www.ordredesarchitectes.be/nl/teksten/cea/ cea.htm (accessed on 28 January 2005).

18 Http://www.ordevanarchitecten.be/nl/teksten/hoofdartikels/0412.htm (accessed on 10 January 2005); Van Gulijk, 2006.

19 PEL/*Barendrecht/Jansen/Loos/Pinna/Cascão/Van Gulijk*, SC, Chapter 5. Sometimes, these other European systems will be also referred to during this study.

view of the European architect's and client's legitimate interests. I will build on the comparative study I carried out in the PEL SC research project[20] where seven articles were established that govern design services of European architects. In this research however, I will carry out more detailed research on the most important obligations of architects towards their clients under the design contract. Next to that, I will examine three other regulation issues that strongly influence European architect law. In the following paragraph, the four regulation issues will be described.

The first regulation issue of this study is *market entry regulation*, which will be examined in Chapter 3. Market entry regulation means that certain requirements have to be met before one is allowed to enter the market. For architects, in particular, this implies that they generally have to comply with educational and training requirements before they are allowed to perform the design contract. So the architect's title is protected by legal rules. Besides that, the architect's profession can be protected, which may lead to a professional monopoly of architects. Accordingly, in some countries, clients are obliged to hire an architect whenever they initiate building activities. This may give architects a strong and central position in the construction process.

The Bolkestein Directive[21] may also influence the market entry regulations relevant to architects in the Member States. The main idea of this Directive is that discriminating measures and regulations that hinder cross-border service activities should be removed in order to create a genuine internal market. Applied to architects, several national legal requirements for services provided by foreign architects may have to be modified or abolished. For example, procedures in which Member States require service providers to supply a certificate, attestation or any other document should be simplified.[22] In Chapter 3, I will therefore pay attention to the relevant rules that follow from this Bolkestein Directive.

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20 In Chapter 2 Section 3, I will also go into this PEL SC-project.

21 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, L376; http://www.eur-lex.europa.eu/JOMonth.do?year=2006&month=12. It is called Bolkestein Directive after its initiator former European Commissioner Frits Bolkestein. See also Busch, 2007, pp. 310-312. See further http://www.ace-cae.org/MemberN/Content/EN/enr/pos/enr001.html (accessed on 5 July 2008), accordingly, the Architects' Council of Europe (ACE) has observed that "there is an increasing demand being made on the profession to have a verifiable means of demonstrating that a person who claims to be an architect is fully and adequately qualified and that they have the legal right to use the title and to exercise the profession. This tendency has been reinforced by the increasing role that is being accorded to consumer associations and by the introduction of mandatory requirements on administrative cooperation between the competent and other Authorities of the Member States of the European Union."

22 See Chapter 2, Section 4.6.

The second regulation issue is *architect liability*. Architects may be liable towards the client for the non-fulfilment of (one of) their obligations under the design contract. Generally, this is either strict or negligence based liability. However, there are many nuances in this distinction as architect liability may arise from many types of legal duties. For example, strict liability may not be that strict when we look at the specific obligations that architects have to perform under the design contract. In the five countries that will be examined, seven comparable specific duties were found that will be investigated in this study to get an overview of the requirements for architect liability in case of the non-performance of these duties. The following seven duties will be examined in Chapters 4 to 10: the (general) duty of care, the architect's duty to examine the building site, the architect's duty to advise on suitable building materials, the architect's duty to advise on applicable laws and rules, the architect's duty to advise on construction costs, the architect's duty to represent the client, and the architect's duty to supervise[23] the building process.

Limitation of architect liability is the third regulation issue of this study. As we have seen, the non-performance by architects of (one of) the design duties[24] may lead to the architect's liability. But architects may be allowed to limit this liability towards the client. There are two major options to do so. First, architect liability may be limited in standard conditions. Second, architects may be allowed to limit their liability towards the client by performing their professional activities in a private company with limited liability. These two options will be investigated in Chapter 11.

Finally, I identified *professional liability insurance* as a fourth regulation issue (Chapter 12). Generally, architects may either be under a legal obligation to take out professional liability insurance, or they may be free to determine their liability insurance cover. In legal systems where architects are obliged to take out professional liability insurance, they may attract more claims from clients as they have deep pockets and are thus able to compensate loss, possibly even more so than other participants in the building process. As with the first regulation issue, market entry regulation, the Bolkestein Directive also provides rules on professional liability

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23 Under the design contract, architects are not always obliged to supervise the realisation of the building works, for example if there is a limited assignment.. Dutch architects, for instance, may be hired to perform limited construction assignments or full construction assignments. According to Article 18 Section 4 SR 1997, full construction assignments are assignments under which the architect has been hired to perform the standard works mentioned in Articles 52 to 54 SR 1997, as well as the supervision of the works. Limited construction assignments concern all other assignments, such as mentioned in Article 55 SR 1997.

24 The obligations of architects towards the client under the design contract, such as the obligation to estimate the costs or to investigate the building site. The most important design duty of architects is to provide a design according to the needs and wishes envisaged by the client.

insurance. Therefore, in Chapter 12, I will also examine whether these rules correspond to the current European situation.

The second, third, and fourth regulation issue *directly* relate to the liability and insurance regime that applies to the professional activities of architects. The first regulation issue, market entry regulation, however, *indirectly* influences the contractual relationship between architects and clients. As we will see, the existence of rules on market entry regulation of architects may strongly influence the liability- and insurance regimes that apply to the professional activities of architects. Therefore, this regulation issue will be examined first (in Chapter 3).

3. Law and Economics Evaluation

As discussed in Section 2, I will examine four regulation issues. These four regulation issues each have two (or more) leading options in which the five European countries have regulated them. I will apply a *law and economics perspective* to evaluate these regulation options. An economic analysis of legal rules may provide an objective method to evaluate which legal rules are to be preferred.[25] It may help to establish which combination of regulation options is likely to lead to more efficient outcomes. Different legal rules lead to different cost and benefits for both parties to a transaction and predicting these costs and benefits may lead to preferring one rule over the other. Economic analysis provides a scientific theory to predict the effects of legal rules on behaviour and on the outcomes for the affected parties, such as architects and clients.[26]

The aim of this investigation is to provide insights in what is the best way to deal with the four regulation issues. I will try to contribute to establishing a new design for European architect law. As is shown in the research question, I will focus on an *optimal combination* of the regulation options considering the interests of architects and clients. The notion optimal is described as maximum fulfilment of the architect's and client's interests. Optimal will be considered cost-efficient, as a maximization of the architect's and client's utility. In Chapter 13, this concept will be explained in more detail. Furthermore, the notion *legitimate interests* implies that the most important interests of clients and architects in their contractual relationship will be taken into account. For instance, financial interests (such as design prices), internal and external competition, and the quality of designs are relevant interests to both architects and clients. These interests are also applied by the national architect's orders for their policies.[27] Furthermore, I

25 Barnes and Stout, 1992, pp. 1-2.

26 See Cooter and Ulen, 2004, pp. 4f.

27 See for instance, *Centre d'études d'assurances*, 2004; Rijksgebouwendienst, 2006; http://www.ordevanarchitecten.be/nl/teksten/hoofdartikels/0412.htm (accessed on 10

will also take into account the interests of third parties, such as safety. As these interests are of public order they matter not only to architects and clients but to third parties as well.

There are many law and economics evaluation frameworks that could be applied to investigate the legal regime applying to contractual relationships, such as a direct application of the Coase theorem or of the Pareto or Kaldor-Hicks criteria.[28] However, in this study I will apply the cost reduction theory of Calabresi.[29] In this cost reduction theory, Calabresi distinguishes three types of costs; primary, secondary, and tertiary costs.

Primary costs are the costs of reducing the number of accidents[30] and the severity of such accidents (prevention costs) and the costs of accidents that are not prevented because preventing them is more costly than letting them occur (costs of damages). Applied to architects, these primary costs may be the costs of taking optimal care while performing their design activity in order to prevent damages, as well as the costs of damages that still occur as a consequence of design activities.

Secondary costs are the costs of spreading the damage, for instance by means of risk spreading or insurance. For instance, it should be investigated whether architects or clients are better able to bear the costs of insurance. In this study, I will call secondary costs the costs of spreading the damage.

Tertiary costs are administrative costs of reducing the primary and secondary costs such as the costs of settlement that are caused by primary and secondary cost reduction. Applied to architects, strict liability systems for instance may entail less tertiary costs than negligence liability systems. So, I will call these tertiary costs administrative costs.

Calabresi's cost reduction theory aims at the reduction of the total of these three types of costs in order to increase efficiency. With his cost reduction theory, Calabresi has provided a framework to analyse the efficiency of the rules of tort law. In particular, he has argued that the most important goal of tort law is to minimize the expected costs of accidents (damages) and the costs of prevention to avoid these accidents.[31] It may be argued that the cost reduction framework of Calabresi can be applied to any rule that aims to reduce damage by giving incentives for certain behaviour. Therefore, it

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January 2005); http://www.ordredesarchitectes.be/nl/teksten/cea/cea.htm (accessed on 28 January 2005); *Ordre des Architectes* (Architect's Order), 2005; *Projet d'architecture* 2007 (http://www.architecture2007.com); RIBA, RIBA Constructive Change: a strategic industry study into the future of the Architect's Profession, December 2005 (http://www.riba.org).

28 In Chapter 13, I will shortly describe these approaches and I will discuss why I have chosen to apply Calabresi's cost reduction theory.

29 Calabresi, 1970.

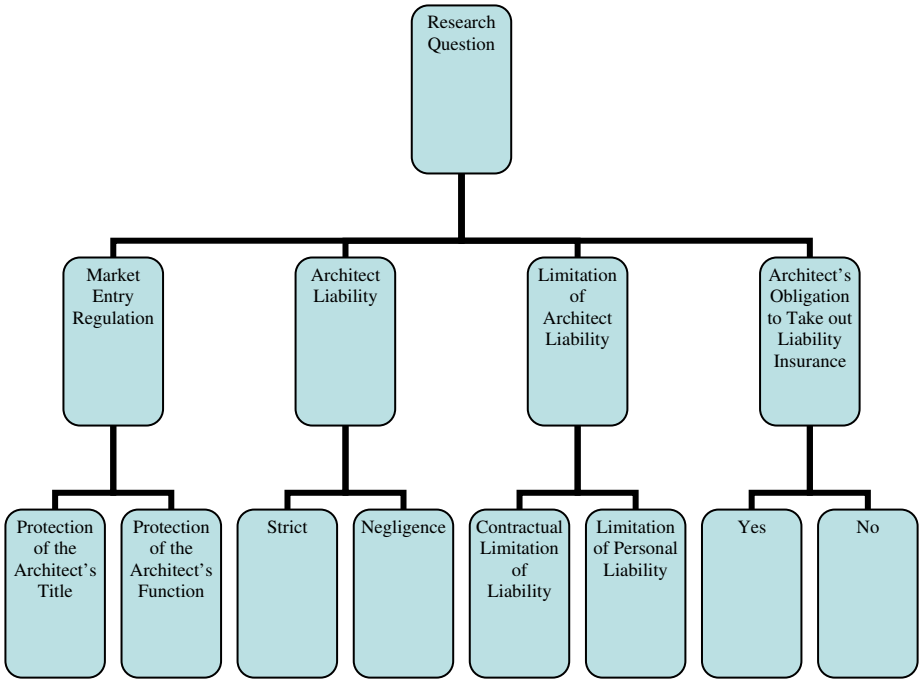
30 The cost reduction theory of Calabresi is mostly applied to accident law but in this study I will apply the theory on contractual damages. See Chapter 13 of this study.

31 Accident law covers the legal rules on the rights of victims of harm to sue and to collect payments from the injurer.

seems that this evaluation frame may also be applied to contractual agreements, for instance the legal relationship between architects and clients. After all, when agreeing to a contract, parties such as clients and architects want to reduce future damage, optimally spread risks, and reduce administrative costs. As a result, contracting parties will allocate the risks by determining which contracting party is the best or cheapest party to prevent these risks, or which party is the best or cheapest party to take out liability insurance. Thus, although Calabresi's cost reduction theory is usually applied to tort law, in this study it will be applied to contractual agreements.

4. Layout

The following grid is a visualisation of the structure of this study.



The grid shows that the research question can be subdivided in the examination of the four regulation issues that were identified in this study. Furthermore, as each of the four regulation issues has two leading options in which it is regulated in the five countries, there are eight regulation issues that will be evaluated through the cost reduction theory of Calabresi.

The grid also shows in which Chapters the four regulation issues will be investigated. In addition, Chapter 2 will contain an introduction to (European) architect law. Furthermore, in Chapter 13, the explanation of the law and economics framework that will be applied for the economic analysis of the regulation options in Chapter 14 will take place. Resulting in Chapter 15 with the most important findings of this study that may be subject of discussion and starting-points towards a new design for European architect law.

CHAPTER 2 Introduction to European Architect Law

1. Introduction

This chapter contains an introduction to (European) architect law. To indicate the contractual relationship between clients and architects I will apply the notion design contract. In each country, however, different descriptions exist to point to this contractual relationship. Therefore, in this Chapter I will start with describing the national qualifications of design contracts in the Netherlands, Belgium, France, Germany, and England in Section 2. Furthermore, in Section 3, the setting of architect law within the general construction process will be explained. Architect law is often examined according to the different functions that have to be performed for the realisation of a construction process, or the different phases that a construction process encompasses. Instead, in this study I have chosen to examine architect law according to the most important contractual duties of architects. This approach is in keeping with the approach that has been applied in the Principles of European Law, Service Contracts (PEL SC). I will explain this choice in Section 3 as well. Finally, in Section 4, international regulations that may apply to the contractual relationship between architects and clients will be described, such as the PEL SC, the Bolkestein Directive, the Professional Qualifications Directive, and the FIDIC regulations.

2. Design Contracts

In some countries, design contracts are specifically regulated (*lex specialis*) in general contract law. In others, such regulation is absent and design contracts fall under the scope of more general types of contract, such as service contracts. Therefore, in the following paragraphs I will describe the national qualifications of design contracts in the Netherlands, Belgium, France, Germany, and England. I will also describe whether standard conditions are (often) applied to design contracts.

2.1 The Netherlands

In the Netherlands, general service contracts are covered by the *overeenkomst van opdracht* (commission contract), unless the particular service is covered by a more specific type of contract.[32] According to this *overeenkomst van*

[32] Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, pp. 263f.

opdracht, service providers commit themselves to a client to perform a service other than the accomplishment of a material work, the storage of a work, the distribution of a work, or the transport of persons or things (Article 7:400 *Burgerlijk Wetboek* (Netherlands Civil Code, BW). As a result, construction contracts, which focus on the supply of a material work, are not covered by the rules on the *overeenkomst van opdracht*. These contracts have been separately established in Article 7:750 BW on *aanneming van werk* (construction contract).[33]

So, the legal assignment between clients and architects is covered by this *overeenkomst van opdracht*. A more specific type of contract that applies to this legal relationship lacks. As the designing activity has an intellectual character it seems to fit the description of *overeenkomst van opdracht* though. Sometimes, however, the agreement between architects and clients is called *overeenkomst van lastgeving* (mandate).[34] But this qualification seems not appropriate as performing acts with a legal effect is not the main element required for an *overeenkomst van lastgeving*. Moreover, it does not correspond to the character of the contractual relation between clients and architects.[35]

In the Netherlands, it is very common to apply standard conditions to design contracts. In these standard conditions specific rules have been established that apply to the legal relationship between architects and designers next to legal rules.[36] The most important standard conditions that are applied are the *Standaardvoorwaarden 1997 Rechtsverhouding Opdrachtgever-Architect* (Standard Conditions 1997 Legal Relationship Client-Architect, SR 1997) 1997, the *Regeling van de Verhouding tussen Opdrachtgever en Adviserend Ingenieursbureau RVOI – 2001* (Regulations 2001 Governing the Relationship between Client and Consultative Engineering Firm, RVOI 2001), and *De Nieuwe Regeling 2005*[37], (The New Regulations[38], DNR 2005).[39] In this study, I will frequently refer to rules from these standard conditions.

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33 According to this Article, construction contracts cover assignments under which the building contractor commits himself to the client in order to perform and supply a material work, for which the building contractor receives payment.

34 Article 7:414 BW.

35 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, pp. 263f.

36 See for instance, Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 264; Chao-Duivis, Koning, and Leijgraaf, 2004, pp. 29-30; Chao-Duivis, 2006(b) on the UAV-GC 2000.

37 The Dutch Government Buildings Agency (*Rijksgebouwendienst*, RGD) has developed its own standard conditions: the Government Building Agencies General Conditions on assignments to Architects and Advisors (*Algemene Bepalingen van de Rijksgebouwendienst voor opdrachten aan Architecten en Adviseurs,* ABAA DNR 2005; http://www.vrom.nl/rijksgebouwendienst (accessed on 17 April 2007). These conditions contain standard deviations and supplements to the DNR 2005. According to Article 15 under 1.1 of these standard conditions, for instance, damage is limited to the costs of advise.

38 Author's translation.

39 These have been realised one-sidedly by the BNA and the *Organisatie van advies- en ingenieursbureaus* (Association of Consulting Engineers, ONRI), with consulting

2.2 Belgium

Belgian design contracts are qualified as *aannemingsovereenkomsten* (construction contracts). The *aannemingsovereenkomst* includes services with an intellectual character and covers the legal relationship between clients and architects.[40] It is a specification of the more general *huur van werk*[41]. Articles 1787-1799 *Belgisch Burgerlijk Wetboek* apply.[42,43] According to Article 1779 *Belgisch Burgerlijk Wetboek* (Belgian Civil Code), *huur van werk* (hiring service provider to perform service) covers *aannemers van werken die handelen ingevolge bestekken of aannemingen* (contractors performing in virtue of building specifications). This differs from Dutch law, where a distinction between intellectual and material works exists. The Dutch *overeenkomst van opdracht* covers intellectual works and the Dutch *aannemingsovereenkomst* covers material works. It is not common in Belgium to apply standard conditions to design contracts.

2.3 France

As in Belgium, French design contracts are commonly described as *louage d'ouvrage*[44] (*huur van werk* or rental agreement) as has been established in

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advisors. For the first time in history, the duties of architects and engineers are covered by one set of standard conditions. However, the opinions on DNR 2005 differ. See Chao-Duivis, 2005, p. 84 and Bruggeman, 2007, pp. 40f. In addition, the *Consumentenregeling 2006 Rechtsverhouding Consument-Architect 2006* (Consumer Regulation 2006 Governing the Relationship between Consumer and Architect, CR 2006) has been established for consumers and apply on small assignments between architects and consumer-clients. See *BladNA*, no. 9, 2006, p. 2; *BladNA*, no. 10, 2006, pp. 7-10. Furthermore, the Dutch government has established standard conditions: the *Algemene Rijksvoorwaarden voor het verstrekken van opdrachten tot het verrichten van Diensten* (General Governmental Regulations 2004 Governing the Distribution and Performance of Services, ARVODI 2004). The ARVODI have also been established one-sidedly but without the help of consulting advisors; Chao-Duivis, 2005, pp. 97-98. These standard conditions seem less important to design contracts than the other three mentioned, however.

40 Burssens, 2001, pp. 25-27. There is a new edition of this book (2004). Unfortunately I was not able to include this new edition in the manuscript before it was printed.

41 Article 1710 *Belgisch Burgerlijk Wetboek*: '*Huur van werk is een contract waarbij de ene partij zich verbindt om iets voor de andere te verrichten, tegen betaling van een tussen hen bedongen prijs*.'.

42 Article 1787 *Belgisch Burgerlijk Wetboek*.

43 Burssens, 2001, p. 27; Goossens, 2003, nos. 43f. These *aannemingsovereenkomsten* also cover service contracts of a consumer and a garage owner to repair or maintain a vehicle, for instance. This resembles the Dutch explanation of the *aannemings-overeenkomst*. See Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, pp. 357f.

44 "*Le louage d'ouvrage peut être défini comme un contrat portant sur un travail, demandé par une personne à un autre, sans que celle-ci soit à son service, et le plus souvent moyennant remuneration*." Darnet, Depuy, and Gendre, 2005, p. 95.

Article 1779 *Code Civil* (French Civil Code).[45] This contract covers material and intellectual services. According to Article 1710 *Code Civil*, *le louage d'ouvrage* is a contract by which one of the parties provides something for the other party, against a fixed price. Furthermore, the Articles 1787ff *Code Civil* provide more rules on the *louage d'ouvrage*.

So, French and Belgian design contracts are equally regulated. Sometimes however, French design contracts may be described as a *mandat* (mandate)[46]. The main difference between the *mandat* and the *louage d'ouvrage* is that the *louage d'ouvrage* fits material or intellectual services and the *mandat* fits legal representation activities on behalf of clients, which is similar as to Belgian and Dutch law.

Standard conditions are not commonly applied to design contracts in France.[47] However, as in Belgium, the French order of architects has established its own contract type (model contract) containing binding rules for design contracts. The latest version applicable is of October 2001, in which the mutual rights and duties of architects and clients have been established.

2.4 Germany

In Germany, it has been debated for a long time whether the *Architektenvertrag*[48] (design contract) should be qualified as *Werkvertrag* (contract of employment) or *Dienstvertrag*[49] (service contract).[50] Therefore, it is sometimes qualified as *Typenmischvertrag* which may be best translated by a mixed standard agreement.[51] Nowadays, design contracts are qualified as a

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45 "*Il y a trois espèces principales de louage d'ouvrage et d'industrie: (...) Celui des architectes, entrepreneurs d'ouvrages et techniciens par suite d'études, devis ou marchés.*" Darnet, Depuy, and Gendre, 2005, p. 32; Saint-Alary and Saint-Alary-Houin, 2003, p. 141; Auby and Périnet-Marquet, 1992, no. 1151f; *Cour de Cassation Civile* 1, 21 January 1963, *Juris-Classeur Periodique* 1963-II, p. 13182.

46 Article 1984 *Code Civile*.

47 See for several of these *contract type*, such as *contrats pour études préliminaires, contrats pour travaux neufs, contrat pour maisons individuelles, contrats de coordonateur SPS, le Cahier des Clauses Générales, and contrat architecte constructeur maison individuelle*: http://www.architectes.org/search?SearchableText=contrat+type; Darnet, Depuy, and Gendre, 2005, pp. 42-43

48 Leineweber, 2000, nos. 7-8, 11.

49 § 611 BGB.

50 Niestrate, 2003, pp. 2-3; Thode/Wirth/Kuffer, 2004, pp. 155f.

51 The *Bundesgerichtshof* has determined that the *Architektenvertrag* should be seen as a *Werkvertrag; Bundesgerichtshof, Baurecht* 1974, 211; *Bundesgerichtshof* 22 October 1981, *Baurecht* 1982, 79. See also Niestrate, 2002, nos. 1-2; Thode/Wirth/Kuffer, 2004, p. 155, nos. 1-3; Locher, 2005, nos. 365-367.

Werkvertrag.[52] Regulation on this *Werkvertrag* has been established in the *Bürgerliches Gesetzbuch* (German Civil Code, BGB), Title 9. According to Section 631 under 1 BGB, the *Werkvertrag* involves architects to render a service and clients to pay in return.[53] Only exceptionally, the rules on the German *Dienstvertrag* still apply. For instance, if a design contract mainly focuses on tax aspects or real estate development, in situations where the architect acts as *verantwortliche Bauleiter*[54], or if the architect is merely hired to perform the *Objektbetreuung*[55] (often in case of large-scale building projects).[56]

Furthermore, it should be mentioned that German architects are bound to a fixed fees system that applies to their building activities. These fixed fees have been established in the *Honorarordnung für Architekten und Ingenieuren* 1996 (Regulations on Fees for Architects and Engineers[57], HOAI).[58] This is a governmental *Verordnung* that is applicable in each German federal state. It is also called a *preisrechtliche Vorschrift* as it does not contain any contractual rights and obligations of architects and clients (such as the *Verdingungsordnung für Bauleistungen*, VOB, for clients and building contractors) but it merely contains the financial rights (fees) of architects and engineers.[59] However, it does give a clear overview of the different *Leistungsphasen* that architects have to perform during the design contract and will therefore be often referred to. For architects, in particular, § 15 HOAI is of importance as in this paragraph rules on the *Objektplanung* (design) have been established.[60] Members of the *Kammern* are obliged to apply the HOAI on behalf of their professional organisation.

2.5 England

As England has a common law system, it lacks a civil code. The architect's legal rights and duties are therefore based on the general (common) law.[61] Usually, architects are employed by the client under the traditional form of

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52 Werner/Pastor, 2008, no. 648f; Löffelmann/Fleischmann, 2007, nos. 65f; Niestrate, 2002, p. 1; Schmalzl, 2006, nos. 450f; Busch, 2007, p. 299, note 15; Leineweber, 2000, no. 28; Krüger, 2007, § 323, no. 34.

53 Bögli, 1996, p. 11; See also *Bundesgerichtshof, Baurecht* 2004, 1640, 1643 on the performances of architects under a *Werkvertrag*.

54 Leineweber, 2000, no. 28. See Chapter 10 on management and supervision.

55 'Taking care for the object.'

56 Niestrate, 2003, pp. 2-3.

57 Author's translation.

58 See Löffelmann/Fleischmann, 2007, nos. 63f and Werner/Pastor, 2008, nos. 600f on the HOAI; See also Dankelman, 1999, p. 82.

59 Leineweber, 2000, no. 45.

60 Leineweber, 2000, no. 49.

61 See for instance Uff, 2005, p. 6.

building contract.[62] This means that the client hires an architect under a design contract for the design and at the same time the client hires a building contractor under a building contract for the realisation of the building works. The rights and obligations that follow from this form of building contract are called express duties. These express duties are usually explained in standard form contracts used for the engagement of architects, such as the RIBA's Standard Form of Agreement for the Appointment of an Architect, 1999 (SFA/99).[63]

In English construction law practice, several types of contract have been established that cover this assignment. English architects may be employed directly by the client under the traditional form of a building contract or under a design & build contract.[64] Design contracts are generally described as a contractual relationship between clients and architects in order to prepare a design.[65] The notion design has no precise meaning in building contracts but it certainly encompasses the planning of the form of the finished works.[66]

3. Architect Law

Architect law is part of general construction law. General construction law may be divided into several parts. In Dutch literature, there are two accepted approaches to do so.

Firstly, construction law may be distinguished into four functions.[67] According to the first function, the client initiates building activities. These activities usually cover the disposal of the construction site and funding. After that, an architect has to draft a design for the client. This is the second function. Then, the third function implies that a building contractor takes care of the realisation of the design, which sometimes architects are hired to supervise. This supervision is the fourth function. Obviously, architects will not perform all of these four functions. Regarding design contracts with a limited scope, architects only perform the second function of the actual designing. If architects are hired under a design contract with a wider scope, however, they may also have to supervise the realisation of the works.

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62 Or under a design and build contract, where clients employ a contractor to design and construct the building works and the design professionals will be employed by the contractor. These kinds of contracts will be left out of consideration in this study as I will focus on the more traditional contractual relationship between client and architect (design contract).

63 James, 2002, p. 147; Furst and Ramsey, 2006, no. 1-023; Uff, 2005, p. 225. The SFA/99 was revised in 2004.

64 James, 2002, pp. 146-147.

65 Uff, 2005, p. 299.

66 Uff, 2005, pp. 299-301.

67 Jansen, 1998, pp. 9-10; Hannequart, 1991, p. 853.

Secondly, construction law may be distinguished into the three phases of a construction process.[68] These three phases are the designing activity, the tender of the works, and the supervision of the works. The designing activity may be divided into the realisation of a provisional design, the realisation of a final design, and preparing the construction activities.

Instead of distinguishing in phases or functions, in this study, I have chosen to examine architect law according to seven leading design duties: the (general) duty of care, the duty to examine the building site, the duty to select materials, the duty to comply with applicable legislation, the duty to supply a reliable estimation of the construction costs, the duty to advise, the duty to represent the client, and the duty to supervise[69] the works.[70] These design duties are all covered by one of the phases or functions mentioned earlier, but they do not always belong to one single phase or function. I consider the distinction in different design duties more important than the distinction in functions or phases. The architect's duties are not only distinguished because they fall within certain phase or function; the distinction in different design duties seems more suitable to map architect liability than the distinction in functions or phases.

I am aware that, besides these seven duties, there may be other important design duties, such as the duty of architects to cooperate with clients or specialists for example. This duty to cooperate applies to architects during the entire assignment in order to create a design that fits the result envisaged by the client best. However, it is a rather common duty that also applies to several other services and is not a specific obligation of architects. Clients, building contractors, and other specialists and service providers are obliged to cooperate as well. Therefore, it will not be examined in this study either. The duty of architects to inform their clients (for instance about tax aspects) will not be investigated in this study. It will only be mentioned when necessary. Furthermore, English common law knows some other specific duties, for example the duty to recommend the form of contract under which architects will be employed. These common law duties, however, do not occur in the other legal systems and will therefore not be subject of research.

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68 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 263; Cremers/Zonderland, 1969-1978, part B, IV, no. 1.

69 Under design contracts, architects are not always obliged to supervise the realisation of the works, for instance if the architect has a limited assignment. However, I consider the duty to supervise the realisation of the design as one of the main obligations of the architects. See also Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 271.

70 These seven duties will be dealt with in an order that seems most logic for design assignments. Each of the duties will be accompanied by one or more illustration(s) at the beginning of each chapter. At the end of each chapter, in a scheme the distinction between strict or negligence liability will be outlined.

The approach I have chosen in this study to examine architect law according to design duties, is in keeping with the approach that has been applied in the PEL SC. The PEL SC is a research project initiated by the Study Group on a European Civil Code (SGECC) with the aim to draft common European principles for the most important aspects of the law of obligations and for certain parts of the law of property in movables, which are specially relevant for the functioning of the common market.[71] One of the research projects initiated by the SGECC is drafting such common European principles for service contracts. In 2006, a comparative study on service contracts was completed that resulted in the Principles of European Law on Service Contracts (PEL SC). Basically, a number of principles were drafted for six different types of service contracts.[72] One of these service contracts are design contracts, the comparative study of which I participated in.

So, the PEL SC contain principles on service contracts.[73] The service provider's duties have a central position in the PEL SC. As said, one of the contracts that are dealt with in the PEL SC are design contracts. Although the PEL SC on design contracts do not contain an entire outline of architect law, the distinction in design duties provides a useful frame to examine the first regulation issue on architect liability. The principles reflect the current approach of legal problems in the area of service contracts.[74] It has to be considered, though, that the actual content of the duties may differ in each country. Moreover, individual negotiations between the contracting parties will influence the content and scope of these duties too.

Generally, there is a great deal of criticism to the use of principles with the aim of harmonisation of European contract law. According to Smits, for instance, the use of principles should not be overestimated as a future European contract law will have to take many more sources, such as European directives, case law of the European Court of Justice, and case law of the European national contract law systems, into account than just principles. Codifying principles would not do justice to this diversity of sources.[75]

Moreover, Smits argues that the approach of applying principles to harmonise European contract law, instead of European directives, tries to cover all contracts in a more generalised way. Directives, on the other hand, lead to a diverse contract law. This would be necessary to justify the considerable differences in mentality and outlook between the civil and common law systems. For example, important concepts such as fairness

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71 PEL/*Barendrecht/Jansen/Loos/Pinna/Cascão/Van Gulijk*, SC, p. *VII*.

72 PEL/*Barendrecht/Jansen/Loos/Pinna/Cascão/Van Gulijk*, SC, p. *XIII-XIV*.

73 PEL/*Barendrecht/Jansen/Loos/Pinna/Cascão/Van Gulijk*, SC, p. 127.

74 PEL/*Barendrecht/Jansen/Loos/Pinna/Cascão/Van Gulijk*, SC, p. *XIII-XIV*.

75 Smits, 2001; Smits, 2006.

often differ within the Member States. The making of general principles is therefore argued not to be in line with this cultural diversity.[76]

Others, however, defend that civil and common law traditions are drawing progressively closer in Europe and that it is likely that the legal systems of the European Member States will form one great legal family with uniform or strongly similar rules in many areas.[77] In this respect, the making of principles (such as the PEL SC) would seem quite a good instrument to do so.

4. Other International and European Regulations

Not only the national legal framework provides laws and rules that apply to design contracts. European principles, European directives, and international regulations may also apply to the contractual relationship between architects and clients. In Section 3, the PEL SC were already introduced. In this Section I will shortly introduce the Bolkestein Directive, the Professional Qualifications Directive, and the FIDIC regulations. Although there may be more international organisations providing rules on the contractual relationship between architects and clients, these in particular seem relevant to this study and will therefore be focussed on.

European Directives may provide rules for Dutch, Belgian, French, German, and English architects. In this study, I will refer to two Directives in particular. Firstly, the Bolkestein Directive has been established in order to encourage the free movement of architects within the European Union.[78] The European Commission has presented a proposal for a Directive to create a genuine internal market in services by requiring Member States to cut administrative burdens.[79] This Directive applies to services, as defined in Article 4; "The concept of service covers a wide variety of ever-changing activities, including (…) building work, including the services of architects (…)." Applied to architects, several requirements for services provided by foreign architects have to be modified or abolished. Secondly, the Professional Qualifications Directive (Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications) applies to architects as well. This Directive ensures the recognition of higher education diplomas.[80] During this study, I will refer to these two Directives where necessary.

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76 See in particular Smits, 2000; Smits, 2006; Smits, 2007; Legrand, 1996, pp. 56-57; Legrand, 2004.

77 De Groot, 1992, p. 11; Busch, 2007.

78 Http://www.architectenregister.nl/pdf/01sba.pdf (accessed on 18 October 2005). See also Busch, 2007, pp. 310-312.

79 Brussels, 13 January 2004; http://www.europa.eu.int/comm/internalmarket.

80 See also Busch, 2007, p. 308.

Furthermore, the International Federation of Consulting Engineers[81] (FIDIC) Conditions of Contract may apply to design contracts.[82] These are international sets of standard conditions, established by several interest groups, which may apply to the architect's assignment.[83] These standard conditions may be applied by contract parties regardless of which legal system is applicable. International contracts often adopt the FIDIC Conditions of Contract. In particular, the Conditions of Contract for construction, the Conditions of contract for plant and design-build, and the Conditions of contract for engineering, procurement and construction are important.[84]

5. Summary

This chapter encompasses an introduction to European architect law. In Section 2 I explained several frequently used concepts regarding national architect law and the national qualifications of design contracts. In Section 3, I explained why I have chosen to examine architect law according to seven duties of architects under the design contract, instead of according to the functions or phases of architect law. This approach is in keeping with the approach that has been applied in the PEL SC, which were introduced in Section 3 as well. Finally, in Section 4, the Bolkestein Directive, the Professional Qualifications Directive, and the FIDIC regulations were introduced because these may also apply to the contractual relationship between architects and clients. If so, I will specifically refer to them in this study.

81 *Fédération Internationale des Ingénieurs-Conseils.*
82 Furst and Ramsey, 2006, no. 1-023.
83 Van den Berg, 2007, pp. 537f.
84 See, for example, Bunni, 2002 and Chao-Duivis, 2006(b) on the FIDIC.

CHAPTER 3 Market Entry Regulation

1. Introduction

This chapter is about the first regulation issue of this study, *market entry regulation*. I will explain the national rules on market entry that apply to architects. Basically, market entry regulation means that service providers have to meet certain requirements before they are allowed to enter the market. These requirements foremost aim at achieving economic efficiency in well-functioning competitive markets.[85]

It is often argued that rules on market entry increase the quality standard of professions.[86] After all, governments or professional organisations often impose training and education requirements to service providers. These service providers are only allowed to enter the market if they have complied with these requirements. As a result, these requirements may prevent low-quality service providers from entering the market.[87] The quality of the service provider and the service therefore increases, which is in the public interest.[88]

In liberal professions, the requirements that are imposed on service providers are often applied by means of *licensing* or *certification.* The difference between licensing and certification is that licensing restricts entry into a certain profession and certification does not. This means that if a profession is licensed, service providers who do not have a license are not allowed to perform this profession. If certification is used, every service provider may be active in the profession but only those who have a certificate may use the protected title of that profession.[89] This certificate can only be obtained if the service provider has fulfilled certain training or education requirements. Clients can choose whether they wish to hire certified or uncertified service providers. This choice does not exist in a licensed market, however.[90]

Despite these positive effects of market entry on the quality of professional services, often market entry regulations hamper the free entry

85 Sherman, 2008, p. 53.

86 See Law and Kim, 2004, p. 4 for an extensive literature overview on this topic. See also Faure (*et al*) 1993, p. 33.

87 See for instance Philipsen, 2003, p. 12; Law and Kim, 2004, p. 3; Kleiner and Kudrle, 1997, p. 1.

88 Philipsen, 2003, p. 12; Schaumans and Verboven, 2006, p. 1; Van den Heuvel Rijnders, Lackner and Verkerk, 2004, p. 12; Faure (*et al*), 1993, p. 33.

89 Philipsen, 2003, pp. 32-33.

90 Philipsen, 2003, p. 34.

of service providers to a market. Therefore, these regulations are often called *entry barriers* because they prevent service providers from providing their service at a market. For example, governments can determine that only governmental organisations may supply electricity. Or large investments can be required before service providers are able to enter a market.[91]

Such entry barriers frequently occur in telecommunication markets, electricity markets, postal service markets, and in liberal professions such as lawyers, physicians, notaries, pharmacists[92], and architects.[93] It is argued that these entry barriers try to limit the access of service providers to a profession. As a result, possible competitors cannot perform their services at these markets and the level of competition in that profession decreases. Sometimes, this is described as a monopoly for the service providers that have access to the profession.[94]

What rules on market entry do apply to architects in particular then? Generally, architects have to comply with educational and training requirements before they are allowed to perform the service of designing. In that respect, national professional organisations of architects require architects to comply with these requirements to ensure the quality of design services carried out by architects.[95] These organisations also supervise the compliance of architects with these requirements.[96] Only architects who meet the requirements are allowed to carry the title of architect and perform design activities under that title. The same kind of title protection often occurs with lawyers and notaries as well.

Besides this *title protection*, in some European countries, architects have the exclusive right to perform design activities. I will call this the *protection of the function* of architects. As a result, clients are obliged to hire an architect whenever they initiate building activities. It may be argued that this leads to

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91 See Bresnahan and Reiss, 1990 for an empirical measurement of the competitive costs of entry in monopoly markets.

92 See Philipsen, 2003.

93 For telecommunication and electricity markets see for instance Shepherd, 'Problems in Creating Effective Competition', pp. 50-71 in Gabel and Weiman, 1998.

94 Law and Kim, 2004, p. 3; Faure (*et al*), 1993, p. 21. See also Friedman and Kuznets, 1945 and Shepard, 1978 in general.

95 See also Busch, 2007, pp. 302-305.

96 In literature, two important advantages have been mentioned to this kind of selfregulation by professional organisations. Firstly, members of the profession have good knowledge of the quality of the services they provide and can therefore best control service quality. Secondly, the costs of regulation are born by the profession itself. However, there are disadvantages as well. For instance, professional bodies may lack incentives to control and enforce the quality standards. Furthermore, the fact that professional organisations regulate market entry does not mean that clients are well informed about the quality of the service. Therefore, self-regulation by professional organisations could increase the client's costs of finding an architect. In Chapter 14, I will go into these costs of self-regulation in more detail. See especially Faure (*et al*), 1993, pp. 39f.

a monopoly for architects as clients are obliged to hire them. In countries where the architect's function is not protected, on the other hand, clients are free to determine whether or not they want to hire an architect to provide a design. In these countries, architects are not in a monopoly position.

In Section 2 to 6 of this Chapter, the market entry regulations that apply to Dutch, Belgian, French, German, and English architects will be detailed explained. In particular, I will go into the title protection and the protection of the function of architects. Because the title protection depends on the education of architects, I will also describe the technical and vocational training of architects per country. In Section 7 then, I will discuss that the Bolkestein Directive is also relevant to the market entry regulation of architects. I will summarize in Section 8.

2. The Netherlands

At the beginning of the 20th century, the Netherlands saw a discussion on the protection of the architect's function. At the time, the architect's exclusive right to the design activity was the government's goal. However, clients and building contractors were not willing to cooperate with the government to think about regulations on the protection of the architect's function as they did not want to be obliged to engage an architect. Moreover, such extensive legal protection did not seem necessary because of the existing legal framework and the BNA's private initiatives.[97]

The 1987 *Architectenwet*[98] was the final outcome of this discussion. This law provides rules on the architect's title and registration. Its main purpose is to protect the quality of the housing conditions and the professional skill of architects.[99] Before realisation of this law, it was argued that Dutch architects have severe responsibilities towards the Dutch community because the Netherlands is a rather densely populated country. Furthermore, it was found necessary that architects are sufficiently educated to protect consumers.[100]

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97 Dankelman, 1999, p. 88.

98 *Memorie van Toelichting bij het ontwerp van wet, Kamerstukken II 1979/80, 16.191, nr. 3,* (Explanatory Memorandum tot the Architect's Title Act, Parliamentary Documents Lower House 1979/80, 16.191, no. 3).

99 Explanatory Memorandum tot the Architect's Title Act, Parliamentary Documents Lower House 1979/80.16.191, no. 3.

100 Explanatory Memorandum tot the Architect's Title Act, Parliamentary Documents Lower House 1979/80.16.191, no. 3. Former Minister Dekker of the *Ministerie van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* (Department of Housing, Regional Development, and Environment) decided to stick to the legal protection of the architect's title, which is in line with the Bolkestein Directive and the Directive Professional Qualifications. According to the Minister, the *Wet op de Architectentitel* provides a legal framework that is required to implement these directives. However, the law may be strengthened in order to comply with European legislation. For example,

This *Architectenwet* ensures the quality of each person who is entitled to carry the title of architect. Only registered architects may perform design services under the title of an architect. The *Stichting Bureau Architecten-register* (Architect's Register, SBA) is the official Dutch institute that manages this architect's register.[101] Architects are obliged to register at the SBA. In order to obtain this registration, architects have to comply with certain requirements, such as handing over a diploma or certificate.[102] This sees to it that architects have to be sufficiently educated to perform the profession of designing.[103]

Dutch students can be educated to the professional job of architect in two ways. There is a four-year university education and a six-year part-time training at a Technical College, which both lead to the title *bouwkundig ingenieur* (constructional / structural engineer).[104] Architects with two years professional experience are allowed to become member of the BNA.[105] The *Regeling voor permanente beroepsontwikkeling*[106] (Permanent Professional Training Regulations, PBO), which applies as of January 2006 to Dutch architects, contains rules on the professional education of BNA-members. These rules imply that architects should at least spend 30 hours per year on professional training.

It has been discussed by Dutch politicians and architect's organisations recently, that architects should be obliged to take more permanent professional training and have two years of professional experience in practice before obtaining their professional title.[107] European directives such as the Bolkestein Directive and Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications are the main reason for that. In this respect, it has been argued that the *Architectenwet*[108] should become a more influential

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two years of professional experience, professional liability insurance, and permanent professional training could be introduced as additional requirements for architects in order to be allowed to perform the profession. See also http://www.architectenregister.nl/ pdf/02_dewet.pdf (accessed on 18 October 2005) and *BladNA*, no. 10, 2005, pp. 6-7.

101 See http://www.architectenregister.nl.

102 *Wet op de Architectentitel*, Article 9f.

103 For more information on this professional education, see Dankelman, 1999, pp. 85-90.

104 Dankelman, 1999, pp, 86-87.

105 The BNA was founded in 1908 in order to realise public protection of the architect's title and profession.

106 Author's translation.

107 *BladNA*, no. 1/2, 2006, p. 20; *BladNA*, no. 10, 2006, p. 13.

108 *Wet van 7 juli 1987, houdende regelen omtrent de bescherming van de titels architect, stedenbouwkundige, tuin- en landschapsarchitect en interieurarchitect*. (Architect's Title Act observing rules on the protection of the professional titles of architects, town planners, landscape architects, and interior architects, *Wet op de Architectentitel/Architectenwet*); *Memorie van Toelichting bij het ontwerp van wet, Kamerstukken II 1979/80, 16.191, nr. 3,*

quality tool.[109] Recently (June 2008), the Dutch government decided that architects have to spend at least 16 hours per year on their professional training. Compared to the 30 hours that are required for BNA-members, this minimum of 16 hours is rather low, however. Moreover, this proposal seems free of obligations as sanctions or supervision lack.[110]

So, as the government's initiatives in the early twenties to protect the architect's function have not been followed, nowadays, Dutch clients are free to choose whether or not they engage an architect whenever they initiate building activities. According to Dankelman, this is because the Dutch construction process is strongly regulated; many legal requirements apply to the architect's design as well as the construction process. In particular, these requirements are meant to protect the quality and safety of the building.[111]

After all, in Article 40 *Woningwet* (Housing Act), minimum quality requirements for buildings have been established, which have been specified in the *Bouwbesluit* (Building Decree). In short, if a building license is required for a building, preventive inspection by the government is allowed. If a building license is not required, the initiator of the works has to comply with the *Bouwbesluit* as well. He may be liable if inspection after realisation of the building shows that the quality requirements of the *Bouwbesluit* have not been (duly) met.

This system of building and housing inspection seems to control the public order aspect instead of protecting the function of the profession of architects. As a result, each person may perform the services of an architect, provided that the design complies with the requirements of the *Bouwbesluit*, regardless whether this person carries the title of architect.

(Explanatory Memorandum to the Architect's Title Act, Parliamentary Documents Lower House 1979/80, 16.191, no. 3).

109 *BladNA*, no. 9, 2005, p. 3; *BladNA*, no. 4, 2006, p. 2.

110 *Kamerstukken II*, 2007/08, 31.079, nr. 10 (Parliamentary Documents Lower House 2007/2008, 31.079, no. 10); *Memorie van Antwoord bij Wijziging van de Wet op de Architectentitel, Kamerstukken II*, 2007/08, 31.079, C (Memorandum of Reply to the Alteration of the Architect's Title Act, Parliamentary Documents Lower House 2007/2008, 31.079, C); http://www.bna.nl/nl/nieuws/ nieuwsberichten,bna/2008/06/wet-arch-titel.html (accessed on 12 June 2008); http://www .rijksbouwmeester.nl/nieuws/nieuws_architectentitel_opleidingen.html (accessed on 12 June 2008); see also *Rijksgebouwendienst*, 2006. In September 2008 the *BNA Academie* was initiated in order to offer architects retraining so that they can still meet the construction assignments that get more complex nowadays. See http://www.bna.nl/nl/nieuws/persberichten,2008/02/bna-academie.html (accessed on 24 June 2008).

111 Dankelman, 1999, p. 86.

3. Belgium

As in the Netherlands, Belgian architects have to register their name at the *Tableau van de Orde*[112] (bar) if they want to carry the title of architect. They can only register if they have complied with several requirements on education and training, public safety (architects have to design structures that do not cause any risk to the public), and aesthetics (often designs have to fulfil certain regulations regarding the external appearance of buildings) in order to be allowed to perform the service of designing.[113]

In order to obtain the degree of architect, Belgian architects have to fulfil five-year training at a Technical University (which allows carrying the master in the science of constructional engineering) or five-year training at a Technical College (which allows carrying the title master in the architecture). In both instances, architects have to do a two year practical training also.[114]

Furthermore, according to Article 4 *Wet van 20 februari 1939 tot bescherming van de titel en van het beroep van architect* (1939 Act on Protection of the Title and Profession of Architects, *Architectenwet*)[115], Belgian clients[116] are obliged to engage an architect whenever they initiate building activities that require a building license.[117] This means that the function of Belgian architects is protected, contrary to the one of Dutch architects. According to the 1936/1937 bill, it was considered urgently necessary to legally safeguard the architect's performance in order to prevent disastrous outcomes. It seems that the protection of the Belgian architect's function in particular aimed at protecting the public interest as this interest was mentioned first over other interests in the bill.[118] These other interests are the following: the safety of the

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112 *Orde van Architecten België* (Belgian Association of Architects) Wet van 26 Juni 1963 tot instelling van een Orde van Architecten (Staatsblad 5, VII, 1963) (1963 Act on the establishment of an Architect's Order).

113 Burssens, 2001, nos. 23 and 43; Burssens *(et al),* 2007, pp. 13, 32.

114 Orbasli and Worthington, 1995, p. xvi; *Centre d'études d'assurances*, 2004, p. 1/3.

115 *Belgisch Staatsblad* 25 March 1939. The *Architectenwet* aims at the protection and promotion of the title and profession of architects. Besides that, the workmanship, morality, and the prosperity of the architectural standard are being protected.

116 Such as public authorities, municipalities, public institutions, and consumers (Article 4 *Wet van 20 februari 1939 tot bescherming van de titel en van het beroep van architect).*

117 Article 4; 'The government, counties, municipalities, public institutions and private persons have to appeal to the cooperation of an architect in order to draw a design and supervise the realisation of the design, for which by statutes, resolutions and regulations a preliminary request for a building permission has been imposed.' This explains why Belgium has twice as much architects than the Netherlands; 1, 06 % - 0, 47 % per inhabitant; *Centre d'études d'assurances*, 2004, pp. 1/2 and 1/3. Belgian clients may hire different architects for different aspects of the design contract; the *voorontwerp* (preliminary design), *uitvoeringsontwerp* (final design), *technische leiding* (technical management), and supervision; Burssens, 2001, no. 26.

118 Burssens, 2001, p. 40. This obligation does not apply to designing ships, airplanes, or software for example because of the function of public order that goes along with

building and of the people occupying it, the aesthetics of the building, hygiene, the conservation of the countries' artistic possessions, the contribution to the artistic possessions of the country, and the financial means[119] that were invested into the project by architects also needed to be protected.[120]

The obligation of Belgian clients to engage an architect applies to the drawings of the design and the supervision of the realisation of the design, because these are the core activities of architects.[121] However, clients are not in all situations obliged to hire an architect. According to the 1939 Law, clients are only obliged to hire an architect if a building license is required for the building activities.[122] By Royal Decree it has been listed what cases do not fall under this scope.[123]

In Belgian literature, architects are clearly considered to have a monopoly position. However, because the design contract is an extensive assignment containing tasks as to the allotment, checking the accounts, and coordinating the tender, architects can hire engineers to perform certain specific technical design services, for which architects have not been sufficiently educated.[124] For example, specialists may be charged with technical issues, such as concrete construction studies and calculations concerning the material's resistance.

In case architects hire engineers to perform design services, it is argued that architects limit their liability towards the client.[125] Therefore, it has been argued that the architect's monopoly position is less strict.[126] However, architects have to hire *professionally skilled* specialists for the performance of these design activities. So, if the architect could have discovered any

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designing a building; "*Het blijkt dringend noodzakelijk de uitoefening van dit beroep wettelijk te beschermen, ten einde de rampspoedige gevallen te voorkomen die kunnen voortspruiten uit het huidige karakter der verhandelingen inzake onroerende goederen*."(It seems urgently necessary to protect the performance of this profession, in order to prevent the disastrous consequences that may come from the current nature of the debates concerning immovable properties.); *Ontwerp van Wet op de bescherming van den titel en van het beroep van architect, Memorie van Toelichting,* pp. 2-3 (Explanatory Memorandum to the Protection of the Titel and Profession of Architects) (Autor's translation).

119 It would seem that the financial means of clients need protection instead of the financial means of architects, however.

120 *Kamer der Volksvertegenwoordigers, Zittingsjaar 1936/1937, nr. 236, 'Ontwerp van wet op de bescherming van den titel en van het beroep van architect. Memorie van Toelichting,'* pp. 2-3 (Explanatory Memorandum to the Bill on the Title and Profession of Architects, no. 236).

121 Burssens, 2001, no. 24.

122 Article 4.

123 Article 4, *Wet van 20 februari 1939 tot bescherming van de titel en van het beroep van architect;* Burssens, 2001, no. 24; Deketelaere, Schoups and Verbeke, 2004, nos. V.8.

124 Deketelaere, Schoups and Verbeke, 2004, nos. V.8-V.12.

125 *Hof van Cassatie* 3 March 1978, *Arresten van het Hof van Cassatie* 1978, 780; Burssens, 2001, no. 106.

126 Burssens, 2001, no. 106; Dankelman, 1999, p. 61.

deficiencies in this specialist's performance, he is still liable towards the client.

4. France

By the 1977 Architect's Act, the title of architect has been protected. French architects practicing design activities are obliged to register their name at the *Conseil National de l'Ordre des Architectes* (National Order of Architects, CNOA) if they want to carry the title of architect and perform design services under that title.[127] As in Belgium and the Netherlands, this registration requires architects to be sufficiently educated and trained to perform design activities. This implies that architects have to take professional trainings when necessary.[128]

The technical and vocational training of French architects primarily takes place at universities and implies five-year training. Besides that, the *Ecole Spéciale d'Architecture* and civil engineering training in *Strasbourg* are officially recognized as private training institutions. Often a two- or three-year practical training is included. Currently, there is discussion on extending the basic education with one-year practical training.[129]

Besides a title protection, according to Articles 1 and 3 Architect's Act, the architect's intervention in the construction process is mandatory.[130] As a result, clients are obliged to hire an architect if they initiate building activities. This obligation is established because "*l'architecture, expression de la culture, est d'intérêt public*".[131] The protection of the architect's function aims at the protection of the quality of architecture.[132]

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127 Articles 9-11 *Loi sur l'architecture*; Darnet, Depuy and Gendre, 2005, pp. 23 and 80; Saint-Alary and Saint-Alary-Houin, 2003, p. 136. Http://www.architectes.org/connaitre-l-ordre/presentation-de-l-ordre-des-architectes/ fonctionnement-et-organisation (accessed on 15 December 2006)

128 Article 26 *Loi sur l'architecture*; Article 10 *Code des devoirs* (Professional Regulations Act, *Journal officiel du 25 mars 1980 et rectificatif du 21 juin 1980; Code de déontologie des architectes*. Http://www.architectes.org/connaitre-l-ordre/textes-regissant-la-profession/ decrets-d-application/code-des-devoirs (accessed on 10 May 2007).

129 Dankelman, 1999, pp. 59-60.

130 Darnet, Depuy and Gendre, 2005, p. 22, Saint-Alary and Saint-Alary-Houin, 2003, p. 136; Dalloz, 1998, no. 3; Article 3, *Loi no 77-2 du 3 janvier 1977, Loi sur l'architecture* (Architect's Act, *Loi sur l'architecture*), "*Quiconque désire entreprendre des travaux soumis à une autorisation de construire doit faire appel à un architecte pour établir le project architectural faisant l'objet de la demande de permis de construire...*" (Anyone who wants to undertake works, subjected to a building permission, will have to appeal to an architect in order to make the design the object of the required building licence.) Http://www.architectes.org/exercer-la-profession/acces-a-la-profession (accessed on 15 December 2006).

131 Article 1, *Loi sur l'architecture*; http://www.architectes.org/exercer-la-profession/acces-a-la-profession (accessed on 15 December 2006). The protection of the architect's title

According to article 33-3 of a 2004 act for the simplification of the law[133], however, the French government is allowed to command further rules on the requirement on access and performance of the profession of architect. This indicates a reform regarding the architect's market entry.[134]

In French law a distinction between the client's obligation to hire an architect for obtaining a building license and for providing the client a design has been established. According to Article L. 421-2 of the *Code de l'urbanisme* (Construction Act), the client's obligation to hire an architect sees only at the demand of a building license.[135] Clients are obliged to engage an architect for issuing a building license in four situations.

Firstly, *toute personne physique* (natural persons) not building for themselves are obliged to hire an architect. It seems that only building trades are meant. Secondly, natural persons building for themselves and using employees are obliged to hire an architect to obtain a building license, if the construction exceeds certain extent; 170 m^2 for habitation, 800 m^2 for sheds, and 2000 m^2 for conservatories. Thirdly, *toute personne morale* (legal entities), either private or public entities, commercial companies, or associations, are obliged to hire an architect to obtain a building license.[136] Finally, clients have to engage an architect for their design activities in case of new or existent construction works for which a building license is required.[137]

However, many important works, such as renovation works, works that stay within the scope of 170 m^2 for habitation, 800 m^2 for sheds, 2000 m^2 for conservatories, and extensions of existing surfaces have been excluded from this obligation.[138] These exceptions do not concern social organisations that are bound to hire an architect, however, such as *surface entreprise*.[139]

Furthermore, in Article R. 421-1 of the Construction Act, several categories of works have been listed that are excluded from the client's obligation to hire an architect. These are primarily works that are not considered construction works. For instance, laying cables, designing or building statutes and monuments, renovation works, and works on public roads.[140]

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applies to *architectes d'agrees en architecture ou de societé d'architecture* (registered architects, members in good standing of a professional organisation).

132 Http://www.architectes.org/connaitre-l-ordre/presentation-de-l-ordre-des-architects (accessed on 15 December 2006).

133 Loi no. 2004-1343, 9 December 2004: *JO* 10 December 2004, no. 287 (*Loi de simplification du droit*).

134 Darnet, Depuy, and Gendre, 2005, p. 22.

135 Darnet, Depuy, and Gendre, 2005, p. 83.

136 Huet, 2004, p. 37.

137 Huet, 2004, pp. 35f; Article 5 *Loi sur l'architecture.*

138 Huet, 2004, pp. 37-38; Article 4 *Loi sur l'architecture*; Darnet, Depuy, and Gendre, 2005, p. 83.

139 Darnet, Depuy, and Gendre, 2005, p. 82.

140 See also Darnet, Depuy, and Gendre, 2005, pp. 70-71.

Overall, it seems that the French client's duty to engage an architect is very much restricted to new or existing construction works for which a building license is required (these are works of a certain surface as has been explained above). However, this seems to cover most design assignments initiated by clients.

5. Germany

In Germany, the architect's title is protected as well. In order to be allowed to employ the title of architect, every architect must be registered at the *Bundesarchitektenkammer* (Federal Chamber of German Architects, BAK). This is a private organisation that represents the profession's interests within the parliament and government. Furthermore, the BAK unites 16 *Länderarchitektenkammer*; the professional organisations of each state. As these *Kammern* each have a legal basis in the legislation of the *Länder*, there are sixteen different architect's acts. The most important task of the *Länderarchitektenkammern* is to administer the public architect's register. Only architects who are registered at this *Länderarchitektenkammer* are allowed to use the title architect and may perform design activities under that title.[141]

In order to be able to register their name and be allowed to carry the title of architect, as in the other countries, architects have to comply with education and training requirements.[142] In Germany, these education requirements imply an academic degree or a certificate of the *Fachhochschule*. The academic training is five years, whereas the training at the *Fachhochschule* is three or four years. As the length and structure of the education at the *Fachhochschule* are managed by the different German states, there is much diversity in education for German architects. This illustrates the specific German situation; architect law is separately regulated by each state. However, many important national professional decisions apply to the country as a whole.[143] The training requirements imply two or three years of professional training. The *Bund Deutscher Architekten* (German Architect's Organisation, BDA) and the German states currently disagree about whether this period should be extended.[144]

As German architects are often responsible for the entire construction process (from the first design up to the actual reception of the works), they are required to be acquainted with all aspects of the construction process. Architects, who are officially registered and therefore allowed to carry the title of architect, are considered capable of effectively finalising a

141 *Centre d'études d'assurances*, 2004; http://www.bak.de, (accessed on 18 October 2005).

142 Http://www.bak.de; Busch, 2007, p. 303; Dankelman, 1999, p. 81.

143 Http://www.bak.de (accessed on 18 October 2005).

144 Http://www.bak.de; http://www.architektenweiterbildung.de; http://www.bda-architekten.de (accessed on 20 June 2007); Dankelman, 1999, pp. 80-81.

construction project.[145] However, the *Kammern* only protect the architect's title, not his function.[146] The client is not obliged to hire an architect to perform design activities, therefore. However, the right to submit a building plan is reserved for persons with certain professional qualifications. Therefore, the architect's title is most important in this respect.[147]

6. England

English architects have to register their name and title at the Architect's Registration Board (ARB)[148] in the Register of Architects if they want to carry the title of architect and perform design services under that title.[149] According to the Architects Registration Act 1938, only architects who are registered at this ARB are allowed to use the title of architect and practise as an architect.[150] English architects who wish to register their name have to be sufficiently educated (minimum three years), must have at least one-year professional training, and must have several years of professional experience in practice.[151]

This education of English architects takes place at universities or at Higher Vocational Education institutes. The RIBA administers the professional education of architects by a system in which the professional organisation acknowledges exams of certain training institutes if these institutes are authorized by the RIBA. Apart from that, the RIBA voluntarily inspects trainings minimal once per five years.[152] With that, the RIBA directly influences the education of English architects.[153]

According to the 1938 Architect's Registration Act[154] and Section 20 under 1 of the 1997 Architects Act[155], only the title of architects is protected.[156] As in the Netherlands and Germany, English clients are not obliged to engage an

145 Dankelman, 1999, p. 81.

146 See also Busch, 2007, p. 303.

147 Busch, 2007, p. 303; § 70 paragraph 3 *Bauordnung für das Land Nordrhein-Westfalen*; Dankelman, 1999, p. 81.

148 This ARB has been established by the 1997 Architect's Act. It is an independent statutory regulator of all UK registered architects with the aim to protect consumers and to safeguard the reputation of architects. The ARB maintains the Register of Architects, publishes codes of professional conduct and practice and may discipline architects for unacceptable professional conduct or serious professional incompetence. James, 2002, p. 145; Section 1(1) Architect's Act.

149 Section 20(1) Architect's Act 1997; James, 2002, p. 144f; Furst and Ramsey, 2006, no. 13-003.

150 Architects Registration Act 1938 under 1.

151 Dankelman, 1999, pp. 71-72.

152 Dankelman, 1999, pp. 69-70.

153 Orbasli and Worthington, 1995, p. xiv.

154 1 & 2 Geo. 6. CH 54.

155 1997 c. 22.

156 Uff, 2005, p. 131. Statutory registration for engineers is not obliged.

architect when they initiate building activities. Contrary to the Netherlands however, according to the RIBA there seems to have been no discussion on the protection of the architect's function in England. It seems that, in England, the public order and safety interests of clients have been protected by the rules that have been established in the Building Regulations (2000)[157], which govern the design and construction of building works.[158] For example, these Building Regulations contain several explicit technical rules on safety and hygiene.

7. The Bolkestein Directive

One of the central ideas of the Bolkestein Directive is that the position of service providers on the European market should be emphasized and strengthened. Discriminating measures and regulations that hinder cross-border service activities should be removed in order to achieve a genuine internal market. Applied to architects, this implies that requirements on licenses for foreign architects should be reduced. Therefore, Chapter II, Section 1, Article 5, Section 2 deals with the simplification of procedures;

"Where Member States require a provider or recipient to supply a certificate, attestation or any other document proving that a requirement has been satisfied, they shall accept any document from another Member State which serves an equivalent purpose or from which it is clear that the requirement in question has been satisfied. They may not require that a document from another Member State be produced in its original form, or as a certified copy or as a certified translation, save in the cases provided for in other Community instruments or where such a requirement is objectively justified by an overriding reason relating to the public interest."

According to Section 3, the simplification of procedures does not apply to the documents referred to in Article 46 of the Proposal for a Directive of the European Parliament and of the Council on the Recognition of Professional Qualifications. Section 1 of Article 46 says;

"Where the competent authorities of the host Member States decide on an application to pursue the regulated profession in question (…) those authorities may demand the documents and certificates listed in Annex VII."

According to Annex VII under 1b, these are "copies of the attestations of professional competence or of the evidence of formal qualifications giving

157 Building Regulations, 2000, no. 2531.

158 See Uff, 2005, pp. 508f.

access to the profession in question, and on attestation of the professional experience of the person concerned where applicable."

The market entry regulations regarding the protection of the architect's title that apply to architects, as has been explained in this chapter, fall under the scope of these qualifications. If a Member State requires that only registered architects are allowed to perform the profession of architect under that title, proof of this registration is sufficient for performing their services in other Member States. Therefore, this market entry regulation seems to comply with Article 5, Section 2 of the Bolkestein Directive.

It may be argued that the Belgian and French laws and rules on the protection of architects correspond to the Bolkestein Directive as well. According to Recital 24 and 24a of the Bolkestein Directive, it has been established that there may be "overriding reasons relating to the public interest" that prevent certain formal requirements from not being imposed with the aim of administrative simplification. These overriding reasons may be "(…) public policy, public security, public health, and the protection of consumers (…)". These reasons cover the causes that were the basis for establishing an obligation of the client to hire an architect in Belgium and France. This seems another argument in favour of the protection of the function of Belgian and French architects.

8. Summary

In all countries examined, architects have a legal obligation to register their name at registration boards in order to be allowed to carry the title of an architect. In each country this registration requires architects to comply with several educational and training requirements. This protection of the title of architects seems to aim at protecting the quality of the profession of architects.

In addition, in Belgium and France, the function of architects has been protected as well. Accordingly, Belgian and French clients who initiate building activities have a legal obligation to engage an architect for their design activities. In particular, these clients are obliged to hire an architect if their design activities require a building license, which covers most building activities. In both of these countries, this legal obligation has been established to protect the public safety. This complies with the rules that have been established in the Bolkestein Directive on this topic.

Dutch, German, and English clients on the contrary, are free to determine whether they want to hire an architect for their design activities. In these countries, the function of architects has not been protected.

(figure: page 43)

Market Entry Regulation

Country Protection	Netherlands	Belgium	France	Germany	England
Protection of the Title of Architects	Yes	Yes	Yes	Yes	Yes
Protection of the Function of Architects	No	Yes	Yes	No	No

CHAPTER 4 Design with Due Care

1. Introduction

In Chapters 4 to 10, the second regulation issue, *architect liability*, will be examined by investigating seven obligations that architects have to perform under the design contract. In this chapter, the most basic obligation of architects will be examined: the architect's duty to design with due care. It may be argued that this is an obligation to comply with in any case; a minimum standard that should be observed by architects.

Generally, in each country, architects will have to observe a certain standard of care while they are performing their design duties under the design contract. This duty of care may encompass several obligations, for instance to observe the state of the art. However, in each country architects have different obligations and other obligations are emphasized. Often, these have been established in case law.

Illustration: *A client asks an architect to design a house according to the latest design standards. When accepting this job, the architect must be sufficiently skilled and educated. He should be able to perform the assignment while conforming the state of the art.*

In some countries, architects are under an obligation of means when performing their obligation to design with due care, whereas in other countries they are under an obligation of result. Although in each country the notion 'breach of contract' may be explained in a different way, the distinction between an obligation of means and result can be made for each national system. This is important because the other specific obligations that architects have to perform under the design contract are based on this distinction.

If architects are under an obligation of means, negligence liability applies. This means that architects are only liable if they have not observed reasonable care and skill (the standard of care). Under negligence liability, clients who claim damages or specific performance have to prove that the architect did not render the required efforts and therefore acted negligently. If architects are under an obligation of result, strict liability applies. In that case, if an architect has not fulfilled the design contract he is at fault. Architects have to provide a design that is fit for purpose. The mere fact that the design is not fit for purpose leads to the presumption that the architect is liable for the resulting damages.

In this Chapter, I will investigate whether architects are under an obligation of means or result when performing their obligation to design with due care. In order to do so, I will first explain for each country what the general duty of care that is based on general contract law encompasses for architects. Furthermore, I will explain what other, more specific, obligations architects may have. These specific obligations to observe due care have been established in standard conditions or case law. First, in Section 2, I will explain the general and specific rules on the duty of care that follow from the PEL SC.

2. PEL SC

A duty of care may also be established in principles, such as the PEL SC. In Article 1:107 PEL SC, a general duty of care for services contracts has been established. Accordingly, architects generally have to carry out the design contract with the care and skill normally to be observed in the circumstances of the case. Architects must at least have the intention to achieve the result stated or envisaged by the client.[159] In order to establish in each particular case whether the result envisaged can be achieved, architects seem obliged to identify and control the client's needs and wishes, provide a tailor-made solution that fits these needs and wishes, and examine the circumstances in which the service is to be performed.[160] If architects can perform the design service with a higher standard of care and skill than the standard that is required, this higher standard may have to be observed.[161]

As described in the introduction to this Chapter, in most countries this general duty of care has been divided in more specific obligations that architects have to perform under the design contract. So in Article 5:104 PEL SC a specific duty of care for architects has been established. Accordingly, architects are required to attune the design to the work of other architects who contracted with the client (under a), to integrate the work of other designers, such as advisory engineers (under b), to include any information for the interpretation of the design (under c), to enable the user of the design to give effect to the design without violation of public law rules or interference based on justified third-party rights (under d), and to provide a design that allows economic and technically efficient realisation (under e).[162]

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159 See PEL/*Barendrecht/Jansen/Loos/Pinna/Cascão/Van Gulijk*, SC, p. 218.

160 PEL/*Barendrecht/Jansen/Loos/Pinna/Cascão/Van Gulijk*, SC, pp. 230-231.

161 PEL/*Barendrecht/Jansen/Loos/Pinna/Cascão/Van Gulijk*, SC, pp. 216-218.

162 See PEL/*Barendrecht/Jansen/Loos/Pinna/Cascão/Van Gulijk*, SC, pp. 650f for the complete description of Article 5:104 PEL SC and for the explanation of this Article; Barendrecht, 2008.

In the following sections I will explain for each country what general and specific obligations architects have on behalf of national law under the duty of care.

3. The Netherlands

According to Article 7:401 BW, architects have to observe the care of a professionally skilled service provider. Because this does not provide architects with explicit obligations to observe during the performance of the design activity, it has been further specified in specific obligations. In Dutch architect law, these specific obligations have been established in standard conditions that usually apply to the legal relationship between architects and designers[163]. According to these standard conditions, architects for instance have to assist the client as an independent and competent *vertrouwenspersoon* (confidant).[164] In Article 11 Section 1 SR 1997 (second sentence) the notion '*naar beste weten en kunnen*' (to his best knowledge and ability) can be observed, which is comparable to Article 5 paragraph 1 RVOI-2001 which says '*naar beste weten belangen van de client behartigen en zijn diensten naar beste kunnen en wetenschap verrichten*' (look after the client's interests to his best knowledge and perform his services to his best ability and knowledge). In particular, architects have to perform their design services as competent and careful architects with normal professional skill.[165] This clearly reflects an obligation of means for Dutch architects.[166]

According to Article 13 Section 1 in conjunction with Section 4 SR 1997, competent and careful architects, meaning normally attentive and performing their profession in a normal way, should be able to avoid *verwijtbare fouten* (imputable faults).[167] In Article 13 DNR 2005, a similar rule has been established; architects are liable for *toerekenbare fouten* (accountable

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163 See for instance, Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 264; Chao-Duivis, Koning, and Leijgraaf, 2004, pp. 29-30. See Chapter 2, Section 2.

164 Article 11 Section 1 SR 1997 and Article 11 Section 2 DNR 2005.

165 Bruggeman, 2007, p. 44.

166 According to Chao-Duivis, Koning, and Leijgraaf, 2004, pp. 30-31, case law of the *Stichting Arbitrage-Instituut Bouwkunst* (Architectural Arbitration Institute, AIBk) and *Geschillencommissie Koninklijk Instituut voor Ingenieurs* (Disputes Committee Royal Institution of Engineers, KIVI NIRIA), however, seems to tend to an obligation of result of architects instead of one of means as architects seem only allowed to witdraw from liability if a third party (and not the architect) has made a fault. This would mean that it differs per design activity whether architects are under an obligation of result of means.

167 This rule is comparable to the rule that has been established in RVOI-2001, Article 16 paragraph 1 and Article 5 paragraph 1; see Chao-Duivis, Koning, and Leijgraaf, 2004, p. 35.

faults).[168] The notions *verwijtbaar* and *toerekenbaar* have a similar meaning in the DNR 2005 and SR 1997.[169]

In order to avoid these *verwijtbare fouten*, the design should conform to the state of the art. This means that the design has to comply with the state of science and technology at the time of the actual design activity.[170] Both in the SR 1997 and the DNR 2005, liability rules have been established according to this state of the art principle. This state of the art principle is commonly applied to design assignments.[171]

To determine whether the design complies with the state of the art at the time of the actual design activity, it is crucial whether or not the architect at the time of the actual design activity was or should have been aware of the unfitness of the design, regarding his professional knowledge of this science and technology at the time of designing.[172] If he was not and should not have been aware, however, the damage is not for the architect's risk or account.[173] For instance, the state of the art in 1990 was not familiar with the possible results of an experimental design; the architect was not expected to take into account the possible damages.[174] In another case, it was determined that the architect had to see to it that the building contractor applies materials that conform to the requirements regarding fire-resistance.[175]

This state of the art idea brings about that architects are required to keep up with specialist literature and equipped with normal know-how.[176] If they lack this professional knowledge to perform the design service, architects have to hire an expert.[177] However, architects are not expected to foresee the damage that occurs, for instance if the state of the art did not acknowledge the present material or method at the time of the actual design activity.[178]

For example, an architect who applied Western Red Cedar wood and had informed himself of the qualities of this type of wood, which turned out to

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168 See Bruggeman, 2007, pp. 46-47.

169 AIBk 20 July 1994, *Bouwrecht* 1996, p. 433. Van den Berg, Bregman, and Chao-Duivis (*et al*) 2007, p. 266.

170 It has also been argued that the design should warrant a *goed en deugdelijk bouwwerk* (sound building) that conforms to the client's requirements. See Van den Berg, Bregman and Chao-Duivis (*et al*), 2007, pp. 265-266.

171 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 266. In the RVOI-2001, Article 16 paragraph 1, this state of the art principle has been established as well. See Chao-Duivis, Koning, and Leijgraaf, 2004, p. 35.

172 Van den Berg, Bregman, and Chao-Duivis (*et al*) 2007, p. 266; Cremers/Zonderland, 1969-1978, Part B-IV, no. 8; Hondius, 1976, p. 116; Wesseling, 1984, p. 558.

173 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 266.

174 AIBk/RvA 9 February 2000, *Bouwrecht* 2001, p. 538.

175 AIBk 16 August 2000, *Bouwrecht* 2001, p. 253.

176 KIVI, 20 July 2000, *Bouwrecht* 2001, p. 166; Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 266; Bruggeman, 2007, p. 44.

177 AIBk, 3 February 2003, *Bouwrecht* 2004, p. 75.

178 *Raad van Arbitrage* (Arbitration Board, RvA) 9 February 2000, *Bouwrecht* 2001, p. 802; see Chapter 6, Section 2.

have good qualities in practice, was not held liable for the damage that was caused by the application of this wood, taken into account the knowledge and experience that was available at that time.[179]

In another case, however, the architect was held liable for his choice to apply MDF (Medium-Density Fibreboard) to a construction. At the time of the design activity in 1992/1993, there was not yet enough experience with this material. The architect should have known from the material's composition that its application would cause problems to the construction. It was argued that the architect had taken too big a risk by applying the material to the particular structure. Taking such risk was found a culpable failure according to Article 55, Section 1 SR 1997.[180]

4. Belgium

In Belgium, a general duty of care that applies to architects has been established by the rules on the *aannemingsovereenkomst* in the *Belgisch Burgerlijk Wetboek*.[181] Belgian architects have to observe the *regels van goed vakmanschap* (regulations on professional skill). They should perform their service according to the standard of an average man of his profession.[182]

So, as in the Netherlands, Belgian architects have to be acquainted with the state of the art of designing[183] and with other special requirements that apply to their design assignment.[184] For example, architects are considered to be familiar with their specialist literature.[185] If they lack special knowledge regarding (parts of) the performance of their design activity, they should hire an expert.[186] If an architect accepts an assignment whereas his education and experience are inadequate for that assignment, he is negligently liable if he does not hire an expert and his client suffers a loss.[187]

In the *Reglement van Beroepsplichten* (Professional Duties Regulations[188], 1985)[189], specific rules have been established that architects have to observe

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179 AIBk, 14 May 2003, *Bouwrecht* 2004, p. 165.

180 RvA 21 September 2001, *Bouwrecht* 2002, p. 1049.

181 Articles 1134, 1146, and 1789 *Belgisch Burgerlijk Wetboek*; Baert, 2001, nos. 1171f.

182 Baert, 2001, no. 1172; *Hof van Cassatie*, 3 March 1978, *Pasicrisie belge* 1978, pp. 759-763; *Hof van Cassatie* 25 October 1973, *Arresten van het Hof van Cassatie* 1974-75, 263; *Antwerpen* 23 March 1994, *Tijdschrift voor Aannemingsrecht* 1997, 232; *Antwerpen* 9 October 1990, *Tijdschrift voor Aannemingsrecht* 1997, 164.

183 *Gent* 26 June 1997 *Rechtskundig Weekblad* 1998-1999, 543.

184 *Brussel* 2 December 1959, *Res et Jura Immobilia* 1959, 379.

185 Baert, 2001, no. 1174; *Hof van Cassatie* 3 December 1962, *Pasicrisie belge* 1962-I, 414.

186 Baert, 2001, no. 1181; Chao-Duivis, 2005, pp. 90-91.

187 Baert, 2001, nos. 1181-1182.

188 Author's translation.

189 *Koninklijk Besluit* 18 April 1985. The *Reglement van Beroepsplichten* has a semi-legal status. This is because the *Orde van Architecten* is a legal entity established on behalf of public law (*publiekrechtelijke rechtspersoon*) according to Article 2, *Wet van 26 juni 1963 tot*

while performing their design activities.[190] According to Article 1 Section 3 *Reglement van Beroepsplichten*, architects have to observe the *règles de l'art de la profession de l'architecte* (rules of due care and professional skill).[191] These rules imply that architects have to perform their profession with due skill and efficiency and in compliance with professional standards.[192] Architects who are not acquainted with the state of the art, or who do not make the efforts normally made by their colleagues, betray the client's trust. Lack of knowledge and untidily labour is thus often found negligence.[193]

So, generally, Belgian architects are under an obligation of means when performing their design activities under the design contract. This implies that a client has to demonstrate that an architect in the individual circumstances of the case has not made all efforts that a normally cautious and rational architect could have been expected to make in such circumstances.

However, as opposed to what generally applies, for certain design failures strict liability applies. If the stability, isolation, waterproofs, and sound insulation of the works are involved, architects are strictly liable. This was established in case law because these design elements are considered the most basic elements that architects have to take into account when performing their design activities under the design contract.[194]

5. France

Generally, architects who perform design activities have to observe applicable rules of the *Code Civil*, for example Articles 1142 to 1155 on the (non-)performance of the service and Articles 1779 to 1792.6 regarding their liability towards the client. The French Article 1792 *Code Civil* differs from the Belgian version (See Chapter 2, Section 3.3). However, like in Belgium, these *Code Civil* rules have been further specified in legislation that specifically applies to architects, such as the *Code de déontologie des architectes*

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instelling van een orde van architecten, (1963 Act on the institution of the Architect's Order, *Wet op de orde van architecten*) *Belgisch Staatsblad* 5 July 1963. The Order has to determine and supervise the regulations on the architect's design duties (Articles 19 and 20 *Wet op de orde van architecten*); Deketelaere, Schoups and Verbeke, 2004, nos. V.18-V.20.

190 See Baert, 2001, no. 1179.

191 Rigaux, 1993, nos. 220ff; Baert, 2001, nos. 1171-1182.

192 Deketelaere, Schoups, and Verbeke, 2004, nos. V.39-V.40.

193 Gent 26 June 1997, *Rechtskundig Weekblad* 1998-1999, 543.

194 Rigaux, 1993, nos. 316 and 403ff; Deketelaere, Schoups and Verbeke, 2004, nos. XI. 16.

(Professional Regulations for Architects[195])[196] and *La loi sur l'architecture* 1977 (Architect's Act[197] 1977)[198].[199]

French architects have to make technical, financial, and legal feasible designs that comply with the client's wishes.[200] As in the Netherlands and Belgium, architects who lack special knowledge or skill should hire an expert to perform certain design activities.[201] Furthermore, French architects have to observe the *règles de l'art*.[202] These regulations imply that *l'architecte est responsable de la qualité de son project* (the architect is liable for the good quality of his service). This implies that French architects are under an obligation of means as has been confirmed in case law and which may be deduced from Article 1147 *Code Civil* as well.[203] If architects do not observe these *règles de l'art*, they will be liable towards the client.

As in Belgium, French architects may be strictly liable towards the client. According to 1792 *Code Civil*, architects are strictly liable for damages affecting the construction's solidity or essential elements of the building that result in a construction that is unsuitable for its purpose. For example, traditional building works, civil engineering works, and certain elements of a building that form an indissociable part of the site development, foundation, framework and covering works.[204] So if Article 1792 *Code Civil* is at stake, French architects are strictly liable, unless if the damages are the result of a *cause étrangère* (circumstances beyond one's control).[205]

6. Germany

According to § 633 paragraph 2 under 2 BGB, the architect's service performance has to be suitable for common use. Besides that, the architect's service has to comply with the client's expectations and with common

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195 Author's translation.

196 *Décret n° 80-217 du 25 mars 1980.* This *Code* has a legal status. Sometimes it is called *Code des devoirs*.

197 Author's translation.

198 *Loi du 3 janvier 1997, Journal Officiel 4 janvier 1977*.

199 This 1977 Act has two objectives: confirm the social scope of architecture and acknowledge that architecture refers to matters of public interest. Darnet, Depuy, and Gendre, 2005, p. 9.

200 Darnet, Depuy, and Gendre, 2005, p. 101.

201 Dalloz 1998, no. 36; Auby and Périnet-Marquet, 1992, no. 1164.

202 Auby and Périnet-Marquet, 1992, p. 453; Huet, 2004, p. 196.

203 *Cour de Cassation Civile* 3, 8 March 1995, *Gazette du Palais* 1995, p. 211; *Cour de Cassation Civile* 3, 3 July 1996, *Juris-Data* no. 002991; *Cour d'Appel Versailles*, 5 December 1997, *Gazette du Palais* 1998, p. 519; *Cour de Cassation Civile* 3, 4 April 2001, *Revue de Droit Immobilière* 2001, p. 258; *Cour de Cassation Civile* 3, 3 October 2001, *Revue de Droit Immobilière* 2001, p. 498; *Cour de Cassation Civil*e 3, 22 June 2004, no 800-F-D, *SCI Cosma c/ Diffo*t. See Darnet, Depuy, and Gendre, 2005, p. 93.

204 Article 1792-2 *Code Civile*.

205 Article 1792-1 *Code Civile*. See Chapter 11, Section 4.

practice.[206] German architects have to provide a design that is both technically and economically faultless according to the generally accepted standards and the state of the art (*Regeln der Technik und Baukunst*).[207] This is called a *Mindeststandard* and German architects have to guarantee (*einstehen*) that the design conforms to this standard.[208]

With the notion 'generally accepted' standards that have not only been proven in theory but also in practice are meant; so standards that have had a testing period.[209] According to the *Oberlandesgericht*[210], the *Regeln der Technik und Baukunst* imply scientifically acknowledged rules such as influential techniques that are proven to be suitable, convenient, and therefore inevitably recognized.[211]

So, this compliance with the state of the art is a minimum standard that German architects have to take into account. Architects may only deviate from the state of the art if the client agrees, for example if new materials are applied in the design assignment.[212] This corresponds to what has been established in the Netherlands. If an architect can not provide a design that complies with the state of the art, the performance is only then effective, if it suits the result expected, or if it suits its normal use.[213]

German architects are not obliged to provide the client with the best design possible; it satisfies if their performance is *brauchbar* (useful, practicable, and workable).[214] If the design is in breach with the *Regeln der Technik und Baukunst*, however, the design is considered defective.[215] For instance, the architect who had not complied with certain DIN-norms[216] had provided a defective design.[217]

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206 Thode/Wirth/Kuffer, 2004, § 9, no. 24.

207 Leineweber, 2000, nos. 96-98.

208 Locher, 2005, nos. 369 and 380; Niestrate, 2002, nos. 24-25; Löffelmann/Fleischmann, 2007, nos. 327f; Thode/Wirth/Kuffer, 2004, § 11 nos. 85 and 90f; Leineweber, 2000, no. 99; *Bundesgerichtshof*, 15 Dezember 1994 VII ZR 246/93 ZfBR 1995, 129.

209 Niestrate, 2002, no. 65. See also Thode/Wirth/Kuffer, 2004, § 11, no. 86.

210 *Oberlandesgericht* Hamm, *Baurecht* 1992, 362; *Oberlandesgericht Bamberg*, 11 November 1998 – 6 U 19/98, *Baurecht* 1999, 650.

211 Niestrate, 2002, no. 65; *Oberlandesgericht Hamm*, 17 August 1990, *Baurecht* 1992, 262.

212 Niestrate, 2002, nos. 24-26, 32; Locher, 2005, no. 369; Löffelmann/Fleischmann, 2007, no. 335; *Oberlandesgericht Hamm* 23 June 1981, *Baurecht* 1983, 174; *Oberlandesgericht Köln* 24 May 1989, *Baurecht* 1990, 103; *Oberlandesgericht Düsseldorf* 20 October 1975, *Baurecht* 1976, 66.

213 Schmalzl, 2006, no. 433.

214 Locher, 2005, no. 380; Werner/Pastor, 2008, no. 860.

215 Niestrate, 2002, no. 64; Thode/Wirth/Kuffer, 2004, § 11, no. 91; Leineweber, 2000, no. 537; *Oberlandesgericht Düsseldorf, Baurecht* 1996, 287.

216 DIN-norms are comparable to recommendations and should therefore be distinguished from statutory rules. Thode/Wirth/Kuffer, 2004, § 9, no. 33; Löffelmann/Fleischmann, 2007, no. 330.

217 *Oberlandesgericht Düsseldorf Neue Juridische Wochenschrift - Rechtsprechungs Report* (NJW-RR) 1994, 88; *Oberlandesgericht Stuttgart, Baurecht* 1996, 78.

7. England

As I explained in Chapter 2, Section 2.5, England has a common law system. Usually, architects are employed by the client under the traditional form of building contract.[218] The rights and obligations that follow from this form of building contract are called express duties, which are explained in standard form contracts used for the engagement of architects, such as the SFA/99.[219]

In these SFA/99 a general obligation of architects has been established, which implies that architects "(...) shall in providing the services exercise reasonable care and skill in conformity with the normal standards of the architect's profession."[220] This general obligation resembles the general duty of care that architects have to comply with under common law. Accordingly, architects have to carry out their express duties with reasonable care and skill, which is the standard of care required (state of the art).[221] This implies that architects are under an obligation of means.[222] Thus, as in the other countries examined, English architects do not have to guarantee that a particular result will be achieved (fitness for purpose). English architects are contractually liable if they fail to exercise reasonable care and skill and are therefore negligent.[223]

To illustrate this, according to the famous medical case *Bolam v Friern Barnet Hospital Management Committee*[224], the concept of reasonable care and skill can be explained as "(...) the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art." In a similar way, in *Hawkins v Chrysler*[225], it was established that "(...) if a professional man enters into a design contract, no warranty will normally be applied beyond a requirement to use reasonable skill and

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218 See Chapter 2, under 2.5. The client may also hire an architect under a design and build contract, which means that clients employ a contractor to design and construct the building works and the design professionals will be employed by the contractor. These kinds of contracts will be left out of consideration in this sutdy as I will focuss on the more traditional contractual relationship between client and architect (design contract).

219 James, 2002, p. 147; Furst and Ramsey, 2006, no. 1-023.

220 Condition 2(1) of the Conditions of Engagement.

221 *Lamphier v Phipos* (1838) 8 *Car. & P.* 475; Section 13 Supply of Goods and Services Act 1982.

222 See Furst and Ramsey, 2006, no. 13-026.

223 James, 2002, p. 148; Furst and Ramsey, 2006, nos. 13-026 – 13-027, 13-038; Uff, 2005, p. 285. English building contractors on the other hand have stricter duties towards the client, for instance to guarantee that the house they build will be fit for habitation when completed.

224 *Bolam v Friern Hospital* (1957) 1 Weekly Law Reports 582. See also *Lusty v Finsbury Securities* (1991) 58 Building Law Reports 66.

225 (1986) 38 Building Law Reports 36.

care." So, as follows from these two important cases, the test is the skill of a competent member of the profession.[226] Although it was established in a medical case, this test applies to all professions which require special skill, knowledge or experience.[227]

For the more specific conditions that clarify this reasonable care and skill one should look at established practice and at the different design obligations that architects have to perform under the design contract.[228] However, often in design assignments architects apply new materials or methods for which there is not yet such established practice. In that situation, architects may not be liable if they acted in accordance with a practice accepted as proper by a responsible body of architects.[229] In *Turner v Garland and Christopher*[230], for example, an architect was explicitly hired by the client to apply a new patent concrete roofing with which he had little experience and which proved to be a failure. The architect was not held liable for his failure to exercise reasonable skill as he had no experience with the material. It was determined that if the architect has not had the test of experience, his failure can still be consistent with the reasonable skill.[231]

Normally competent architects warn the client for any risks involved with certain design choices.[232] In this respect, they are obliged to advise the client to hire specialists if they lack the required skill themselves. Such obligation has been established in Section 2.4 SFA/99 for instance. In that case, the architect is obliged to cooperate with, inform, and integrate information of these specialists. Not the architect but the specialist or advisor is liable towards the client for his negligent design.[233]

So, normally, as in the other countries, English architects are under an obligation of means. In literature, however, three situations have been mentioned in which architects are under a stricter obligation than to exercise reasonable care and skill. Firstly, this is when architects delegate a part of the design activity to a (sub) contractor. Accordingly, architects remain liable for the design, unless the client has explicitly agreed with the delegation to a subcontractor.[234] There are two important cases regarding delegation of design activities.

The first case is *Moresk Cleaners v Hicks*[235] where an architect who was hired to prepare a design for a laundry had delegated the design of a

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226 James, 2002, p. 149; Uff, 2005, p. 287; Wallace, 1995, nos. 2.086-2.087.
227 Furst and Ramsey, 2006, no. 13-026.
228 These circumstances will be discussed in the upcoming Chapters per design duty.
229 Furst and Ramsey, 2006, no. 13-026; Wallace, 1995, no. 2-091.
230 (1853) Hudson's Building Contracts, Volume 2, p. 2.
231 James, 2002, p. 149; Uff, 2005, p. 287.
232 See Furst and Ramsey, 2006, no. 13-026.
233 Furst and Ramsey, 2006, no. 13-039.
234 Uff, 2005, pp. 288-289.
235 *Moresk Cleaners v Hicks* (1966) 14 Building Law Reports 50.

reinforced concrete structure to another contractor because he was not able to design it himself. After two years after completion, cracks appeared in the structure of the roof due to a defective design. The architect was held liable because he had taken upon himself the design of a building and therefore cannot escape liability by delegating his duty to a contractor. The judge said that "(...) if he (the architect) acts upon that advice and it turns out to be wrong, the person whom he employed to give the advice will owe the same duty to him as he, the architect, owes to the building owner."[236]

In another case, *Merton LBC v Lowe*[237], the architect was hired to design a plaster system for a swimming pool ceiling. In this case, instead of the Moresk case, the architect had not literally handed over to another the whole task of design, but had delegated only the making of a ceiling with special materials to nominated sub-contractors. The architect in this case was therefore not held liable because he was entitled to rely on the specialist manufacturer's expertise.[238]

The second situation in which architects have a stricter obligation than to exercise reasonable care and skill is when architects and clients contractually agree upon such stricter obligation whenever the existing circumstances require this[239].[240] For example, if a novel design is to be undertaken or when instead of tried and traditional processes, cheaper ones are being applied, the risks involved must be brought to the client's attention.[241] Another example of these existing circumstances follows from *Greaves & Co (Contractors) Ltd v Baynham Meikle*[242] where a contractor (in that case an engineer) was expressly informed that the first floor of the building was to take the weight of loaded fork lift trucks. However, he failed to design a floor that was fit for this purpose. As a result, the floors cracked. It was determined to be the contractor's duty to make sure that the finished work was reasonably fit for the purpose of the building. It was not merely an obligation to use reasonable care.[243]

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236 For a similar reasoning see *Nye Saunders and Partners v Alan E. Bristow* (1987) 37 Building Law Reports 92 and *London Borough of Merton v Lowe* (1981) 18 Building Law Reports 130, Court of Appeal. See also Wallace, 1995, no. 2.093; Furst and Ramsey, 2006, no. 13-030.

237 *Merton LBC v Lowe* (1982) 18 Building Law Reports 130.

238 Uff, 2005, p. 289.

239 See also *Young and Marten v McManus Childs* (1969) 1 Appeal Cases 454 and *Samuels v Davis* (1943) 2 All England Law Reports 3 no. 42.

240 James, 2002, p. 153. See also Jansen, 1998, pp. 261-262 who mentions *Hall v Burke* (1886) 3 T.L.R. 165 (fitness for purpose for manufacturer) and *Samuels v Davis* (1943) fitness for purpose for dentist).

241 Uff, 2005, p. 287.

242 (1975) 1 Weekly Law Reports 1095.

243 James, 2002, p. 155; Furst and Ramsey, 2006, no. 13-028; Uff, 2005, p. 286. See for more case law regarding these circumstances *Independent Broadcasting Authority v EMI Ltd. and BICC Ltd.* (1979) 11 Building Law Reports 29 (a contractor who undertakes design, supply, and building activities will be taken to have warranted that the finished product

Finally, instead of traditional forms of building contracts, clients can employ a contractor under a design and build contract. These contracts often impose a higher standard than reasonable care and skill, because clients may have more reliance in the contractor as he is hired to perform both the design and the realisation of the works.[244]

So, according to English common law, architects are under an obligation of means to exercise reasonable care and skill. There is no such implied obligation of result, but the particular facts of certain case may require a stricter obligation than the reasonable care and skill.[245]

8. Summary

In this Chapter, I investigated whether architects are under an obligation of means or result when performing their obligation to design with due care. For each country I explained what the general duty of care that is based on general contract law encompasses for architects. Generally, architects have to perform their design activity with reasonable care. This has been established in general contract law (and also in principles such as the PEL SC), and in England in the common law. In all countries, architects have to comply with the state of the art. The specific obligations for architects that emanate from this state of the art have been established in case law. Furthermore, in Dutch law standard conditions provide rules on this state of the art principle.

According to these rules, generally, architects are under an obligation of means in performing their duty of care towards the client. Belgian and French architects, however, are under an obligation of result if the solidity of the works is at stake. And German architects have to guarantee that the design complies with the *anerkannten Regeln der Technik und Baukunst*, which is a *Mindeststandard*. English architects as well are under an obligation to exercise reasonable care and skill. However, particular facts of a case or the situation that an architect delegates the design works can require a stricter obligation than merely the obligation to exercise reasonable care and skill.

(figure: page 56)

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will be fit for its intended purpose, unless negligence liability has been established in the individual design contract), and *Viking Grain Storage Ltd. v T.H. White Installations Ltd.* (1985) 33 Building Law Reports 103.

244 See James, 2002, pp. 153-157; Jansen, 1998, p. 263.

245 Also James, 2002, p. 158; Jansen, 1998, p. 264; *George Hawkins v Chrysler (UK) Ltd and Burne Associates* (1986) 38 Building Law Reports 35 (a professional man, in the exercise of his profession, is normally obliged only to use reasonable care and skill).

Architect Liability

Country Duty	Netherlands	Belgium	France	Germany	England
Duty of Care	Negligence	Negligence	Negligence	Negligence	Negligence

CHAPTER 5 Examination of the Building Site

1. Introduction

As has been explained in Chapter 4, generally architects have to perform the design contract with reasonable or due care. One of the first (specific) activities of architects under a design contract is to examine the building site. For example, they have to investigate the soil conditions to see whether the soil is fit for the building the client has in mind. But the duty to examine the building site may encompass other specific obligations as well. Often, these specific obligations are contractually specified in the individual design contract.

I consider the examination of the building site a highly important task. After all, if architects do not duly perform this examination considerable damages may be the result, for instance because the building subsides due to poor foundation. In this Chapter, I will therefore explain the specific obligations architects have while performing their duty to examine the building site.

Illustration: *An architect was assigned to draft a design for a new office building. Instead of doing a thorough examination of the building site by means of sampling tests, the architect relies on available data that applies to a neighbouring parcel. After a few years, cracks begin to appear in the walls and ceiling of the office building, due to a poor foundation. If the architect had paid more attention to the foundation before drafting his design he would have noticed that he was building on peaty soil, which is known to be swampy. The architect should have adapted the foundation of the building to these conditions therefore.*

2. The Netherlands

For Dutch architects, it is obviously part of their design assignment to examine the soil conditions of the building site.[246] The scope of this duty has been often explained in literature and case law. Basically, architects have to examine the building site duly and carefully. Architects are under an obligation of means in this regard; they have to perform the examination of the building site to the best of their ability, given the existing circumstances. According to case law, these existing circumstances highly determine whether or not an architect has duly performed the examination of the

246 *Gerechtshof 's-Hertogenbosch* 25 February 1981, *Bouwrecht* 1981, p. 876.

building site. The circumstances may require architects to do a more thorough soil examination than what is generally required.[247] For instance, in case of demolition or renovation works of a building that is enclosed by other buildings, architects may have to investigate the condition of these other buildings also. Such investigation may prevent damages to both buildings, for instance when the architect realizes too late that a wall that is to be pulled down is a supporting wall.[248]

In another significant case[249], an architect was held liable for cracking in the walls of an office building. This cracking was due to defective foundation. The architect had neglected to investigate the building site, whereas this was required, certainly as the structure of the office building was based on pile foundations and connected to an existing building that was mainly founded on steel. It was common knowledge that such a construction is very riskful and usually not recommended. However, if the building site allows such structure, the design is not necessarily inadequate. But the architect is required to do thorough building site examinations in such a case.

In a more recent case, an architect was held liable for heavy moisture in a basement because the building's front appeared incapable to resist groundwater. The architect had assessed the depth of the building's construction on the basis of soil drillings and existing technical information of the district water board. However, the building's base turned out to be permanently in the groundwater. It was judged that the architect should not have relied on one single soil drilling to get information about the groundwater level. Instead, he should have informed himself about the local existing highest groundwater level that was considerably higher than the level on which the design was based.[250]

So according to Dutch case law, architects have to take into account the circumstances of each individual case in order to gear the specific obligations they have to perform under their duty to examine the building site to the particular project concerned. In any case, architects are required to examine the building site to the best of their ability, which is an obligation of means.

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247 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, pp. 266-267.

248 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 266; AIBk/RvA 1 December 1994, *Bouwrecht* 1996, p. 517.

249 AIBk/ RvA 12 December 1978 *Bouwrecht*, 1979, p. 230.

250 AIBk/RvA 19 April 1994, *Bouwrecht* 1995 p. 534.

3. Belgium

In Belgium, the architect's obligation to investigate the building site has been established in Article 6 under 1 *Deontologische norm nr 2 Schaal van erelonen voor architecten* (Deontological Regulations no. 2 Remuneration Scale of architects[251]).[252] In particular, as in the Netherlands, architects have to investigate if the foundations of the soil are solid enough to carry the construction that is envisaged by the client.[253] For that purpose architects may have to insist upon soil drilling or other technical samples.[254]

According to case law, the building site has to be fit for the realisation of the building activities by the building contractor.[255] If not, the architect is liable for the client's damages. Belgian architects often hire specialists to assist at the examination of the building site. For example, these specialists can perform certain technical studies for which architects have not been sufficiently educated such as concrete studies. In that case, architects have to verify whether the specialist hired performs his duty in conformity with the care required. They may be liable if they have selected a specialist who lacks sufficient skill.[256] So architects are not entirely excluded from their own liability if they hire specialists to perform the examination of the building site.[257]

As discussed in Chapter 4, generally, architects are under an obligation of means. However, if the stability, isolation, waterproofs, and sound insulation of the works are at stake, strict liability applies and architects have

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251 Author's translation. This document has been established by the *Orde van Architecten*. Instead of the *Reglement van Beroepsplichten*, which has a semi-legal character, the *Deontologische norm* is not semi-legal and is only binding towards the members of the *Orde van Architecten*.

252 This obligation is covered by the *voorontwerp* (preliminary design), which has to enable the client to envisage the architect's design. Furthermore, the design's dimensions should be referred to in the *voorontwerp*. Regarding the performance of the *uitvoeringsontwerp* (definitive designs), technical direction, and supervision, other architects may also be engaged because the architect may not be sufficiently educated to perform these specific (technical) design activities. See Burssens, 2001, no. 434.

253 Burssens, 2001, no. 435; *Gent*, 3 December 1993, *Rechtskundig Weekblad*, 1994-1995, 644; *Rechtbank Antwerpen*, 26 February 1981, *Pasicrisie belge* 1982, 45; *Hof van Beroep Bergen*, 15 March 1983, *Tijdschrift voor Belgisch Handelsrecht*, 1984, p. 283.

254 Deketelaere, Schoups and Verbeke, 2004, no. V.175. Neither in Article 3 Section c *Reglement van Beroepsplichten* nor in the *Deontologische norm nr 2 Schaal van erelonen voor architecten* has been established that architects have to be separately paid for the duty to examine the soil and the probe or excavation works.

255 *Bergen Hof van Beroep*, 15 March 1983, *Tijdschrift voor Belgisch Handelsrecht*, 1984, p. 283; *Brussel* 4 May 1962, *Pasicrisie belge* 1963, II, p. 79; *Gent* 3 December 1993, *Rechtskundig Weekblad* 1994-95, 644; Baert, 2001, pp. 415-418.

256 Baert, 2001, nos. 1199-1200.

257 See also *Hof van Cassatie*, 3 March 1978, *Arresten van het Hof van Cassatie* 1978, p. 780; Burssens, 2001, no. 106.

to comply with an obligation of result.[258] As it seems very likely that severe damage to the building occurs when architects do not duly perform this obligation, they are under strict liability.

4. France

As in Belgium, the obligation to examine the building site of French architects falls within the scope of the *études préliminaires et avant-projet sommaire* (preliminary studies and drafts).[259] The duty to examine the building site is covered by the *préparations des missions nécessaires à l'exécution des avant-projets* (preparation of the required work at the carrying out of the drafts), and is established in Article 2 of the *Code de déontologie des architectes*.

Basically, French architects have to provide a design that fits the existing site conditions.[260] Therefore, they have to examine whether the building site is fit for the designed construction.[261] For example, they may have to investigate the subsoil and the groundwater level. Furthermore, architects may have to make sure that the survey of the site from the client is received before they start their design activities.[262] If an architect risks to be exposed to any disorder caused by bad adaptation of the construction and the building site, he is the one liable for any resulting damages.[263]

Furthermore, architects can ask the client to order a specialist, for instance a land surveyor, to produce a plan containing the limitations of the building site, if they are not sufficiently equipped to do so themselves.[264] However, the client decides whether or not he wants to hire such specialist.[265] If an architect accepts to undertake the examination of the building site and subsequently hires a land surveyor to do the soil examination, he is still liable for the faults of this surveyor. Case law is strict on this issue.[266]

If architects provide a design without having taken into consideration the site conditions this may constitute (*peut engager*) liability. The courts are quite strict at this point.[267] Many cases deal with a breach of the neighbour's right of ownership. When the demolition of a building is at stake and this demolition may cause damage to the neighbouring building, this

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258 Deketelaere, Schoups, and Verbeke, 2004, no. XI.16.

259 Auby and Périnet-Marquet, 1992, no. 1157.

260 Darnet, Depuy, and Gendre, 2005, p. 101.

261 Darnet, Depuy, and Gendre, 2005, p. 99.

262 Darnet, Depuy, and Gendre, 2005, p. 99; Auby and Périnet-Marquet, 1992, no. 1157; Dalloz, 1998, p. 12; *Cour de Cassation Civile* 3, 24 May 1989, *Mon. TP*, 20 October 1989, p. 77.

263 Darnet, Depuy, and Gendre, 2005, p. 101.

264 Huet, 2004, p. 131; Darnet, Depuy, and Gendre, 2005, p. 100.

265 Huet, 2004, p. 131.

266 Darnet, Depuy, and Gendre, 2005, pp. 54, 99-100.

267 Huet, 2004, p. 132.

neighbour's right of ownership can be breached. Architects are held easily liable, even if the neighbour has kept silent during the demolition or the architect has acted in good faith.[268] However, if the architect's fault was caused by the client's insufficient supply of information, case law shows that architects are *not* liable.[269]

Taking into regard Article 1792 *Code Civil*, as in Belgium, this duty of architects is an obligation of result when failures in the examination of the building site affect the solidity or the envisaged purpose of the building.[270]

5. Germany

There is no explicit rule that establishes the obligation of German architects to examine the building site. Sometimes, (landscape) architects have to examine *Freianlage* (districts for recreation or sports for instance), though.[271] In §14 HOAI a list has been established for these *Freianlage*. In the event of a *Freianlage*, the duty to examine the site is one of the *Grundleistungen* (basic duties) of the design activity. As a result, architects are the first ones responsible for these *Grundleistungen*.[272] Therefore, it may be argued that architects are under strict liability if they have agreed on this *Freianlage*. Usually, in construction law, architects are not obliged to examine this *Freianlage*.

Thus, German architects are not under an explicit duty to perform site condition analyses, unless clients and architects have explicitly agreed upon such duty in the individual design contract.[273] This is because this obligation is covered by the general obligation of German architects to provide a design that complies with the *anerkannten Regeln der Technik und Baukunst*.[274] In order to provide such design, architects have to inform themselves about the soil conditions and, if necessary, urge the client to hire a soil expert to exercise soil examinations.[275] Often, however, clients take the initiative to

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268 See *Cour de Cassation Civile,* 7 November 1990, *Bulletin civile* no. 226; *Cour de Cassation Civile* 3, 7 June 1990, *Bulletin civile* no 140, p. 79.

269 *Cour de Cassation Civile* 3, 18 June 1974, *Bulletin civile* no. 253.

270 Huet, 2004, p. 131.

271 Sometimes, (landscape) architects have to examine *Freianlage* (districts for recreation or sports for instance). In §14 HOAI a list has been established for these *Freianlage*. In the event of a *Freianlage*, the duty to examine the site is one of the *Grundleistungen* (basic duties) of the design activity. As a result, architects are the first ones responsible for these *Grundleistungen.* However, usually, in construction law, architects are not obliged to examine this *Freianlage*. See Löffelmann/Fleischmann, 2007, no. 339, 1211; Locher, 2005, nos. 374f; Bindhardt/Jagenburg, 1981, § 6, nos. 16-18; § 15 HOAI – *Leistungsphase* 2.

272 § 15 HOAI – *Leistungsphase* 2; Locher, 2005, nos. 374f; Bindhardt/Jagenburg, 1981, § 6, nos. 16-18.

273 § 15 HOAI – *Leistungsphase* 2; Löffelmann/Fleischmann, 2007, nos. 213f.

274 See Chapter 4; Leineweber, 2000, no. 537.

275 Leineweber, 2000, no. 537.

hire these soil experts.[276] This means that architects usually have to integrate this specialist's work into the design. However, architects are not obliged to check whether or not this specialist has duly performed the site examinations.[277]

If client and architect nevertheless agree in the design contract that the examination of the site is an explicit obligation of the architect under the design contract, this architect may be liable if the examination is not duly performed. Furthermore, as in the other countries examined, architects are liable if they hire a specialist to assist at the examination of the building site, whereas they should have known that this specialist lacks sufficient professional skill to perform the assignment.[278] Case law on this issue is extensive.[279]

German architects, in the situation that they are explicitly assigned to perform activities regarding the examination of the building site, are strictly liable towards the clients in case of any failures. See for instance a 2004 case in which the architect was held liable because of '*mangelhafter Mauerwerksabdichtung mittels Dickbeschichtung ohne vorherige Erforschung des Baugrundes und eine auf die konkreten Boden-und Wasserverhältnisse abgestimmte planerische Darstellung'*.[280]

6. England

English architects as well are under an obligation to examine the building site in order to ascertain whether the site is suitable for the building works to be carried out by the building contractor.[281] This obligation has been recognized and explained in *Moneypenny v Hartland*[282], *Columbus Co v Clowes*[283], and *E.H. Cardy & Son v Taylor*[284].[285] Firstly, in *Moneypenny v Hartland* the contractor (in this case an engineer) was held liable because he had failed to examine the nature of the soil in which to place the foundations

276 See for instance *Bundesgerichtshof* 10 July 2003, *Baurecht* 2003, pp. 1918ff.

277 Löffelmann/Fleischmann, 2007, nos. 217-218.

278 Löffelmann/Fleischmann, 2007, nos. 254.

279 *Oberlandesgericht Düsseldorf* 31 January 1984, *Baurecht* 1985, 341; *Oberlandesgericht Düsseldorf* 19 December 1997, *Baurecht* 1998, 582; *Oberlandesgericht Hamm* 6 May 1997, *Baurecht* 1997, 876; *Oberlandesgericht Zweibrücken* 26 January 1996, *Baurecht* 1996, 404; *Oberlandesgericht München* 19 December 1996, *Baurecht* 1997, 488; *Oberlandesgericht Hamm* 21 May 1997, *Baurecht* 1997, 1069; *Oberlandesgericht Düsseldorf* 9 July 1992k, *Baurecht* 1993, 124; *Oberlandesgericht Oldenburg*, 20 June 1979, *Baurecht* 1981, 399; *Oberlandesgericht Düsseldorf* 10 November 2000, *Baurecht* 2001, 638.

280 *Oberlandesgericht Dusseldorf* 22 June 2004, *Baurecht* 2005, 128ff.(jurlijst)

281 James, 2002, p. 160; Furst and Ramsey, 2006, no. 13-035. See also SFA/99 under 3.01.

282 *Moneypenny v Hartland* (1828) 2 *Car. & P.* 378.

283 *Columbus Co v Clowes (*1903) 1 *King's Bench* 244.

284 *E.H. Cardy & Son v Taylor* (1994) 38 *Construction Law Reports* 79.

285 Furst and Ramsey, 2006, no. 13-035.

of a bridge. In *Columbus Co v Clowes*, the hired architect did not investigate the building site but instead relied upon information from an unauthorized person and made a design on the assumption that the building site was smaller than it actually was. The architect had to adapt the design to a correct plan. Finally, in *Eames London Estates Ltd. v North Hertfordshire District Council*[286], the architect was held liable because he had not ascertained whether the ground was suitable for the loadings.

Obviously, architects have to take into account particular circumstances of the design assignment. In *City of Brantford v Kemp*[287], for example, an architect was to prepare a design for a building to be erected on an old garbage dump. Since the architect was aware of this element of risk, he had a duty to do more than only make a cursory inspection of the soils information available. He should have carried out soil borings and inspect the soil conditions.

Architects have to recommend a soil investigation when necessary, according to *Eames v North Hertfordshire DC*[288]. If they lack the specialist skill to exercise such investigation themselves, they have to advise the client to hire a soil expert to do so.[289] English architects are allowed to delegate their obligation to examine the building site to a contractor according to *Investors in Industry Commercial Properties v South Bedfordshire District Council*.[290]

Regarding the architect's liability for the non-performance of this duty to examine the building site, it should be taken into account that usually building inspectors (who are highly qualified and skilled to exercise this examination, for instance regarding the approval of the depth and state of the excavation works) are hired for this job. Therefore, it will be hard to establish the architect's liability for not having duly performed this obligation. Moreover, it is not unusual that structural engineers or other specialist consultants are hired to advise on whether the building site is fit for the required foundations for instance.[291] So, English architects certainly are under no more than an obligation of means regarding their obligation to examine the building site.

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286 *Eames London Estates Ltd. v North Hertfordshire District Council* (1980) 259 *Estates Gazette* 491.

287 *City of Brantford v Kemp* (1960) 23 Building Law Reports (3d) 640.

288 *Eames v North Hertfordshire DC* (1980) 18 Building Law Reports 50 at 70.

289 Furst and Ramsey, 2006, no. 13-035; Wallace, 1995, nos. 2-124f. See for instance, *Kaliszewska v John Clague and Partners* (1984) 5 Construction Law Reports 62; *Balcombe v Wards Construction* (1981) 259 Estates Gazette 765. *District of Surrey v Church* (1977) 76 Building Law Reports (3d) 72.

290 (1986) 1 All England Reports 781.

291 Wallace, 1995, no. 2-127.

7. Summary

Usually, Dutch, Belgian, and French architects are under an obligation to examine the building site, which has often been established in the law. The scope of this obligation, however, has been established in case law or in the individual design contract with the client. According to case law, architects in particular have to see that the conditions of the site and its surroundings are fit for the designed structure. For instance, in case of demolition works, architects may have to examine the condition of neighbouring buildings. Furthermore, architects may have to investigate the groundwater or carry out soil drillings. In each of these countries, architects may hire specialists to carry out technical activities for which the architect lacks professional skill.

Whereas Dutch architects are under a clear obligation of means, Belgian and French architects however, are under an obligation of result if failures in the examination of the site affect the solidity or the final purpose of the building, which seems very likely because severe damage to the building will occur when this obligation has not been duly performed by the architect.

English architects also are usually under an obligation to examine the building site on the basis of existing case law (*Moneypenny v Hartland* for instance). However, often clients hire more specialised contractors, such as building inspectors or structural engineers to assist with or even carry out these soil examinations. Anyhow, the scope of this obligation of architects has also been explained in case law. It has been established that English architects are under no more than an obligation of means.

German architects are not under an explicit duty to examine the site, because clients usually hire an engineer or technical expert to perform these examinations. However, architects and clients may explicitly agree in the individual design contract that the architect's assignment covers the duty to examine the building site as well. In that case, German architects are under an obligation of result for their obligation to examine the building site.

Architect Liability

Country Duty	Netherlands	Belgium	France	Germany	England
Duty of Care	Negligence	Negligence	Negligence	Negligence	Negligence
Examination of the Building Site	Negligence	Strict	Strict	Strict	Negligence

CHAPTER 6 Advise on Selection of Materials

1. The Duty to Advise

In each of the five countries examined in this study, architects are under a general duty to advise their client. In the Netherlands architects generally have to support their client as an independent and professional advisor.[292] Belgian and French architects have a similar duty to advise their client on construction issues (*raadgevingsverplichting*).[293] German architects are usually under a duty to advise (*Beratungspflicht*) their client too; in that case they are called *Sachwalter*.[294] Finally, English architects also have to advise their client according to SFA/99 under Section 2 and according to Hudson's list of duties[295]. Accordingly, English architects are under a duty to advise and consult with the client, but they are not to be seen as a lawyer. As will be shown, the latter applies to all countries.

However, as will be shown in Chapters 6, 7, and 8, the architect's duty to advise the client entails different more specific obligations for architects as well. For instance, architects are often obliged to advise clients on the selection of construction materials (and sometimes construction methods also), the selection of the building contractor, the content of the building contract, the estimation of the construction costs, the applicable laws and rules, the application of the building license, the allocation of the works, and the reception of the works. In addition, English architects often have to advise their clients on a suitable form of contract for the legal relationship between client and building contractor.[296]

Therefore, in Chapters 6, 7, and 8, I will go into the most important advisory obligations of architects. In this Chapter, the architect's obligation

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292 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, pp. 270; Article 11 Section 1 SR 1997.

293 Burssens, 2001, no. 437; Article 4 *Architectenwet*; *Hof Gent* 24 June 1988, *Rechtskundig Weekblad* 1990-91, pp. 262-264; Rigaux, 1993, p. 277; Deketelaere, Schoups, and Verbeke, 2004, no. V. 188. Huet, 2004, pp. 133-135; Saint-Alary and Saint-Alary-Houin, 2003, pp. 137, 144; Auby and Périnet-Marquet, 1992, no. 1167; Dalloz, 1998, no. 45.

294 Locher, 2005. nos. 456f; Leineweber, 2000, nos. 123, 129f.

295 See Hudson, Hudson's Building Contracts, 1926. This list of duties of architects was suggested by Hudson and remains fairly comprehensive. See also Furst and Ramsey, 2006, nos. 13-032f.

296 Regarding this obligation, architects may not just advise to make use of the well-known SFA/99. If the client wishes to apply other standard conditions, architects are required to explain their scope and content. The architect's advise should include the advantages and disadvantages of these standard conditions. Furst and Ramsey, 2006, no. 13-041; Wallace, 1995, nos. 2.167-2.181.

to advise the client on the selection of construction materials will be examined. In Chapter 7, the architect's obligation to advise the client on applicable laws and rules will be investigated. And in Chapter 8, I will examine the architect's obligation to advise on the construction costs.

2. Advise on Selection of Materials

Once the examination of the building site is finalised, architects will decide on what building materials the building contractor has to use for the realisation of the construction. Basically, these building materials have to be suitable for the realisation of the design. However, during the realisation of the works or even after completion of the works it may transpire that the building materials that were selected are inappropriate for the realisation of the design. As a result, serious damage, delay, or additional costs may occur and the works may have to be modified using other materials. In this Chapter, I will explain how the architect's duty to advise the client on the selection of materials has been regulated and when the architect is liable for the breach of this duty.

Illustration: *An architect was contracted to design the tiled floor of a train station. Before the contract was fully performed, the tiled floor proved to be defective and tiles started cracking. Examination of the tiles showed that they were too fragile for the intended purpose; the architect had clearly selected the wrong material for this specific assignment.*

3. The Netherlands

Dutch architects have to advise the client on the construction materials he should apply for the project he envisages.[297] As we have seen in Chapter 4, basically, the design has to comply with the state of the art.[298] This implies that the materials to be applied for the realisation of the design have to comply with the state of the art as well.

If an architect's choice of construction materials appears incorrect, he can be liable. To determine whether the architect is liable in such case, it is crucial whether or not the architect was or should be aware of the unfitness of the materials at the time of the actual design activity. If he was not or

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297 Article 52, Section 2, under c SR 1997; Van Wijngaarden and Chao-Duivis, 2004-8, no. 466.

298 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 266. According to Article 13 SR 1997, architects are only liable in case of fault. According to DNR 2005 (Article 11 Section 1 under a in conjunction with Article 13 Section 1), a requisite for architect liability is that the damage can be imputed to the architect, and that the architect's fault is proven.

should not (have) be(en) aware, he will not be liable towards the client either.[299]

For instance, if an architect uses materials that have not yet been tested or tried out before, he may be liable for future damages as well.[300] Accordingly, an architect who chose to apply Medium-density fibreboard (MDF) for the finishing of a house, whereas at that time there was not much experience with applying this material, was held liable for the damages as he could and should have known (at least deliberately took the risk) that this application would cause problems.[301]

In another case, an architect who was assigned as being an expert in swimming pool constructions should have known that the wrong type of stainless steel was applied to the ceiling's suspension in the swimming pool. However, he had failed to analyse the quality of this particular type of stainless steel, which caused damage. This caused the architect's liability towards the client.[302]

And in a recent case[303], an architect was held liable because he had too easily believed that the building aesthetics committee would approve the changes in the architect's design. The committee had approved a design in which facade plaster would be used for the sidewall. The architect, however, had changed this material in sheets of steel. The architect should have known that such change might give rise to problems and was therefore held liable for the client's damages.

In the Netherlands, it is common practice nowadays that consulting engineers assist architects in the selection of building materials and construction methods. Often these consulting engineers make choices as to the construction materials. Usually, clients and architects together determine which consulting engineer will be hired, but the client actually hires this specialist. This is called *nevenopdrachtneming* (parallel contracting). Basically, architects are only liable for their own performances. However, in some

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299 See AIBk 14 May 2003, *Bouwrecht* 2004, p. 165. In this case the architect was not sufficiently informed about the qualities of the wood Western Red Cedar. However as at that time the required knowledge and experience with the application of this wood was not known yet, the architect was not considered liable for the damages due to the application of this wood as a building material. In RvA 11 November 1985, *Bouwrecht* 1986 p. 379, the application of the tiles was considered to be risky. In RvA 21 September 2001, *Bouwrecht* 2002, p. 1049, the architect deliberately took the risk that the application of glass blocks for the realisation of the design might be problematic, which was therefore an imputable fault.

300 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 266.

301 RvA 21 September 2001, *Bouwrecht* 2002, p. 1049.

302 RvA 19 January 2000, *Bouwrecht* 2000, p. 604. See also *Gerechtshof Arnhem* 8 January 2002, *Bouwrecht* 2002, p. 630 where for the construction of a dwelling cellular stones had been applied that were not suitable for exterior walls. The architect firm had to clean the wall and impregnate the stones; Van den Berg, 2008, pp. 50-51.

303 AIBk 29 July 2004, *Bouwrecht* 2005, p. 252.

situations they are liable for the expert's performances, for example if the architect has certain expertise himself and therefore should have recognized or noticed that the expert lacked the required know-how.

4. Belgium

Belgian architects as well in general have a duty to advise on technical aspects of the works, such as the applicable building materials. Neither the *Reglement van Beroepsplichten* nor the *Deontologische norm nr 2 Schaal van erelonen voor architecten* provides explicit rules on the obligation of architects to select materials, however.

According to case law and literature, Belgian architects are under an obligation to advise on the building materials though. Accordingly, architects have to advise the client on which materials are best fit for the realisation of the design.[304] Architects have to bring any disadvantages of the materials to be applied to the client's attention.[305] This requires architects to indicate the nature, quality, dimension, and application of the materials.

What if the materials selected are not fit for purpose? According to case law, the unfitness of the applied materials can not be imputed to an architect if a normally informed professional should not have discovered the unfitness.[306] Architects are not considered to subject all construction materials to be applied to lab tests.[307] As we have seen earlier, Belgian architects can hire an expert to perform certain design activities, such as concrete studies. If this expert acted negligently, the architect is only liable if he is or should have been aware that this specialist did not have the professional skill required.[308]

Furthermore, architects have to notify clients of any (future) risk of damages.[309] Foremost, this applies to the use of particular old or new materials. Much case law has appeared on this issue.[310] For example, an

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304 Baert, 2001, nos. 1206-1207; Rigaux, 1993, no. 236; Burssens, 2001, no. 434. *Rechtbank Turnhout*, 22 December 1986 *Tijdschrift voor Aannemingsrecht* 1991, p. 400.

305 *Hof van Cassatie* 3 March 1978, *Pasicrisie Belge* 1978-I, pp. 759-763.

306 *Rechtbank Bergen* 8 October 1990, *Journal des tribuneaux* 1991, p. 585,

307 *Rechtbank Turnhout* 22 December 1986, *Tijdschrift voor Aannemingsrecht* 1991, p. 395.

308 *Hof van Beroep Brussel* 25 November 1976, *Tijdschrift voor Aannemingsrecht* 1981.

309 Baert, 2001, nos. 1206-1207.

310 In *Hof van Beroep Gent* 26 November 1993, *Rechtskundig Weekblad* 1994-95 pp. 1438-1441, architects applied new materials without first consulting a reliable specialist; *Hof van Cassatie* 3 March 1978, *Rechtskundig Weekblad* 1978-79 p. 71; *Hof van Cassatie* 1978, 780; *Pasicrisie Belge* 1978-I, p. 759; *Luik* 16 May 1988, *La Revue de Jurisprudence de Liège, Mons et Bruxelles* 1990, p. 441; *Brussel* 5 October 1979, *Res et Jura Immobilia* 1980, p. 7; *Rechtbank Namen* 13 October 1986, *Jurisprudence Liège*, 1986, p. 657; *Hof van Beroep Brussel* 8 May 1980, *Journal des Tribunaux*, 1980, p. 617; *Brussel* 14 June 1985, *Tijdschrift voor Aannemingsrecht 1987*, p. 100; *Brussel* 25 April 1974, *Journal des Tribunaux* 1979, p. 28; *Mons* 24 December 1986, *Journal de Liège, Mons et Bruxelles*, 1987, p. 381; *Luik* 29 October

architect was held liable for prescribing new materials, at least departing from the materials he used to apply for certain type of roofing constructions, without beforehand informing himself on the properties of these new materials by a known and reliable expert.[311]

The duty to advise on construction materials is an obligation of means.[312] However, as follows from Chapter 4, only if the architect prescribes materials during the design activities that cause (partial) perish of the works, he can be strictly liable because the solidity of the works is at stake.[313]

5. France

Le choix des materiaux, des couleurs et des procédés (choosing materials, colours, and procedures) is an explicit obligation of French architects during the designing process.[314] Architects have to ensure the quality of the design, which includes the architect's choice of construction materials.[315] The design and the materials that are required for its realisation have to be attuned.[316] Therefore, architects have to provide detailed advise on the materials that are to be applied by the building contractor, in *le devis descriptif* (preliminary report).[317] If problems rise due to the materials chosen, architects may be liable if the materials are not fit for purpose.[318]

For instance, in a case where the furnishing of the walls rendered the building unfit for its purpose because of certain safety requirements that were not followed, an architect was held strictly liable for the damages of the client.[319] In another case, an architect, being a professional assigned to perform a full construction assignment, had not sufficiently examined whether the two building materials that were to be applied for the

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1985, *Revue Régionale de Droit*, 1985, p. 339. Hannequart and Clesse, *La responsabilité de l'architecte*, no. 30.

311 *Hof van Beroep Gent* 26 November 1993, *Rechtskundig Weekblad* 1994(95), pp. 1438-1441.

312 Deketelaere, Schoups, and Verbeke, 2004, no. XI.16; Burssens, 2001, no. 437.

313 Rigaux, 1993, no. 316; Deketelaere, Schoups, and Verbeke, 2004, no. XI.16.

314 Article 16 *Code de déontologie des architectes*; Saint-Alary and Saint-Alary-Houin, 2003, p. 143; *Cour de Cassation Civile* 3, 2 October 1979, *Gazette du Palais* 1980-1, p. 64, *Cour de Cassation Civile* 3, 14 November 1979, *Gazette du Palais* 1980-1, p. 118; Huet, 2004, pp. 133-135.

315 Darnet, Depuy, and Gendre, 2005, p. 35; Liet-Veaux and Thuillier, 1994, p. 283; *Cour de Cassation Civile* 3, 4 November 1977 *Gazette du Palais* 1978-1, p. 12; *Cour de Cassation Civile* 3, 19 January 1983 *Gazette du Palais* 1983-1, p. 148; 20 October 1993 *Mon. TP*, 3 December 1993 p. 42.

316 Huet, 2004, pp. 132-134.

317 Saint-Alary and Saint-Alary-Houin, 2003, p. 143.

318 *Cour de Cassation Civile* 3, 3 October 1985, *Revue trimestrielle de droit immobilier* 1986, p. 73; *Cour de Cassation Civile* 3, 10 January 1976, *Bulletin Civile* III, no. 23, p. 17; *Orléans* 20 March 1980, *Revue trimestrielle de droit immobilier* 1981, p. 76.

319 *Cour de Cassation Civile* 3, 2 December 1981: *Gazette du Palais*, 1er June 1981, p. 153.

realisation of the works (filler and concrete) were compatible. This architect was also held liable towards the client therefore.[320]

As in the Netherlands and Belgium, the state of the art principle is important in French law as well (see Chapter 4). Architects are thus liable if the materials chosen for the realisation of the design could not be verified at the time of designing. So the state of the art principle could not be followed then.[321] Regarding this state of the art principle, French architects are considered capable of visualising any risk the construction materials may entail. Accordingly, they should be able to take appropriate measures to avoid damages as a result of these risks.[322] This is a rather severe view and different than under Dutch law for instance, where architects are not expected to be able to foresee these risks. Furthermore, this view is severe because, even if the client has chosen the construction materials, defects in the choice of these materials may still constitute the architect's liability.[323] However, the judges tend to hold clients liable for any resulting damages if they have imposed an architect to apply defective materials.[324]

Overall, architects are under an obligation of result regarding their obligation to advise the client on the selection of building materials.[325] This means that French architects have to be very careful when choosing materials. After all, they are strictly liable towards the client for any defects that affect the construction's solidity or essential elements of the building that result in a construction that is unsuitable for its purpose.[326]

So if an architect's advise on building materials has such impact on the construction, he is strictly liable towards the client. This seems very likely taking into account the considerable damages that may be caused by the non-performance of this obligation. Obviously, the application of new or daring materials or methods increases the risk of architects to be held liable.[327]

6. Germany

German architects have to advise clients on the application of new materials as well.[328] The duty to select materials is covered by the

320 *Cour de Cassation Civile* 3, 30 January 1991, *Gazette du Palais*, 1991-1, p. 132;

321 Darnet, Depuy, and Gendre, 2005, p. 103; *Cour de Cassation Civile* 3, 7 March 1990: *Bulletin civile* 1990, III, no. 69; Dalloz, 1998, no. 40.

322 Darnet, Depuy, and Gendre, 2005, p. 103.

323 Darnet, Depuy, and Gendre, 2005, p. 103.

324 Darnet, Depuy, and Gendre, 2005, p. 103.

325 Saint-Alary and Saint-Alary-Houin, 2003, p. 143.

326 Article 1792 *Code Civile*; *Cour de Cassation Civile* 3, 7 March 1990, *Juridique Notariale et Immobilière* 1990, *Bulletin* III, no. 69, p. 37; Auby and Périnet-Marquet, 1992, no. 1161.

327 Liet-Veaux and Thuillier, 1994, p. 283.

328 Locher, 2005, no. 458; Niestrate, 2003, nos. 251-273.

Ausführungsplanung[329] (*Leistungsphase* 5), which is the final stage of the architect's design activity.[330] In general, architects have to avoid risks during the design activity. In particular, architects have to apply *brauchbares Material*.[331] For example, an architect who had prescribed pinewood for the panelling of a dwelling but had not taken care that only pinewood that was protected from fungal growth was appropriate for this purpose, was held liable for the resulting damages to the dwelling due to moisture.[332]

However, architects are not explicitly required to examine the quality of the chosen construction materials if there is no specific reason to do so.[333] But if an architect prescribes materials that have not been used or tested before, for instance, he should check whether this material is fit for the realisation of the works. For example, an architect who had prescribed the same insulating materials for two different projects without acknowledging their different characteristics in different situations was held liable for the resulting damages.[334]

Overall, German architects are under an obligation of means for their obligation to advise on materials. However, as in the other countries, regarding new materials stricter liability applies. If new materials are applied for which guidelines have not yet been developed, architects must confer with their clients and ask for their approval. In this case, a higher standard of care is required.[335] Furthermore, architects may have to examine the quality of new materials in order to recommend functional materials (*Prüfungspflicht*) that comply with the state of the art.[336] They may even have to point out alternative options where appropriate.[337] Thus, as architects have to meet a higher standard of care, they have to be extra careful when advising on new materials.[338]

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329 Design or construction planning.

330 Löffelmann/Fleischmann, 2007, nos. 120f; Locher, 2005, no. 374.

331 Locher, 2005, no. 403; Leineweber, 2000, no. 568; *Oberlandesgericht Hamm*, *Neue Juristische Wochenschrift* 1990, 523.

332 *Landgericht Düsseldorf*, *Schäfer-Finnern*, Z. 3.01 p. 240.

333 Schmalzl, 1980, no. 47; Locher, 2005, no. 403.

334 *Oberlandesgericht Koblenz Baurecht* 1998, 168.

335 Locher, 2005, no. 403; Schmalzl, 1980, no. 34; Niestrate, 2003, nos. 67-69; Bindthard/Jager, 1981, § 6, no. 40.

336 Löffelmann/Fleischmann, 2007, no. 336; Leineweber, 2000, no. 568; *Oberlandesgericht Köln*, 24 May 1989, *Baurecht* 1990, 103; *Oberlandesgericht Düsseldorf*, 20 October 1975, *Baurecht* 1976, 66; *Bundesgerichtshof*, *Baurecht* 1970, 77; *Oberlandesgericht Celle* 24 September 1992, *Baurecht* 1993, 79; *Oberlandesgericht Saarbrücken*, 28 February 1996, *Neue Juristische Wochenschrift* 1998, pp. 93-94; *Bundesgerichtshof*, *Baurecht* 1971, 58; *Oberlandesgericht Köln*, *Baurecht* 1991, 759; *Bundesgerichtshof* 14 May 1988, *Baurecht* 1998, 872.

337 Locher, 2005, no. 458; Niestrate, 2003, nos. 251-273.

338 Niestrate, 2003, no. 26.

7. England

English architects have to ascertain that the material they recommend for their design is suitable for the structure envisaged by the client.[339] If an architect fails to make proper inquiries about the suitability of materials for the design but merely relies upon the recommendations of a supplier, he is in breach of his duty towards the client. This has been established in *Sealand of the Pacific v Robert C. McHaffie*[340], and *Richard Roberts v Douglas Smith Stimson*[341].[342]

To illustrate this, in *Clay v Crump and Sons Ltd.*[343] an architect was held negligent because he had relied on the building contractor's words that a certain wall was safe and did not check it himself; the wall collapsed and persons were injured. On the other hand, an engineer who advised shower tiles that were too slippery was not held liable, though, as he had carefully investigated RIBA product data sheets and trade brochures and had consulted with an experienced specialist.[344]

In Chapter 4 of this study the case *Turner v Garland and Christopher*[345] has been explained. In that case it was determined that if a client hires an architect to design a novel thing about which the architect has had no experience, failure may be consistent with his reasonable care and skill. In addition, in *Victoria University of Manchester v Hugh Wilson*[346], where an architect adopted a novel design for a university building involving cladding a building of reinforced concrete in ceramic tiles which later fell off, the judge said that "(...) it was not wrong in itself to use this relatively untried method of cladding but it did call for special caution. (...) Architects who are venturing into the untried or little tried should be wise to warn their clients specifically of what they are doing and to obtain their express approval."[347]

So, if new materials are applied, architects have to warn their clients of the potential risks.[348] However, if the client gave his express approval on these new materials, architects are considered to have met their standard of care in case anything goes wrong.[349]

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339 James, 2002, p. 160.
340 *Sealand of the Pacific v Robert C. McHaffie* (1974) 51 Building Law Reports (3d) 702.
341 *Richard Roberts v Douglas Smith Stimson* (1988) 46 Building Law Reports 50.
342 Furst and Ramsey, 2006, no. 13-040; James, 2002, p. 161.
343 *Clay v Crump and Sons Ltd.* (1964) 1 Queen's Bench 533 at 559, Court of Appeal.
344 *George Hawkins v Chrysler* (UK) (1986) 38 Building Law Reports 36, Court of Appeal.
345 *Turner v Garland and Christopher* (1853) Hudson's Building Contracts, Volume 2, p. 2.
346 *Victoria University of Manchester v Hugh Wilson* (1980) 2 Construction Law Review 43.
347 James, 2002, p. 150; Uff, 2005, p. 287. See also *Holland Hannen and Cubbits Ltd. v. Welsh Health Technical Service Organisation* (1981) 18 Building Law Reports 89 at 127.
348 Wallace, 1995, nos. 2.099f; Uff, 2005, p. 287.
349 *Victoria University of Manchester v Huge Wilson* (1980) 2 Construction Law Reports 43.

Generally, English architects are under an obligation of means. They do not have to ensure that the materials they advise to use for the building works are fit for purpose. The standard is not that strict.[350] Only if architects both supply the building materials as well as the construction service, they can be strictly liable for the quality and fitness of these materials.[351]

8. Summary

In all countries that were examined, architects have an obligation to select building materials that are suitable for the design envisaged by the client. Usually, this is one of the first activities that architects have to perform under the design contract. If the selected building materials appear to be unsuitable for the realisation of the design, architects are usually liable. If a *client* chooses building materials to be applied, or if an architect hires a specialist to perform certain activities regarding this duty, architects often have a duty to warn the client of any deficiencies.

Dutch, Belgian, and German architects are liable for negligence towards the client for the non-performance of their duty to select building materials. In France, however, strict liability applies to architects. Furthermore, Belgian architects seem under an obligation of result if the non-performance of their duty to select building materials results in damage to the solidity of the works. Finally, in all countries, architects are under stricter liability if they choose to apply new materials or construction methods.

In England, the architect's obligation to advise on construction materials that are fit for the realisation of the building works has been established in case law. Generally, English architects are under an obligation of means. If they apply new materials with which they have had no experience, they should warn the client for the risks involved. If architects are hired to design and build the works, they are under stricter liability, however.

(figure: p. 74)

350 James, 2002, p. 161; *George Hawkins v Chrysler (UK) Ltd and Burne Associates* (1986) 38 Building Law Reports 36.

351 James, 2002, p. 161.

Architect Liability

Country / Duty	Netherlands	Belgium	France	Germany	England
Duty of Care	Negligence	Negligence	Negligence	Negligence	Negligence
Examination of the Building Site	Negligence	Strict	Strict	Strict	Negligence
Advise on Selection of Materials	Negligence	Negligence/ Strict	Strict	Negligence	Negligence

CHAPTER 7 Advise on Applicable Laws and Rules

1. Introduction

During the performance of the design contract, architects have to observe applicable legislation and regulation. They should take into account the laws and rules that are important to the design itself or to the realisation of the design.[352] Although this obligation to advise on applicable laws and rules may be established in the law, in the individual design contract clients often require architects to advise on specific rules such as energy saving rules for instance.

In this chapter, I will answer the question whether or not architects are generally obliged to advise the client on the laws and rules that apply to the design assignment. And if so, what laws and rules exactly should architects take into account during their assignment? The scope of this obligation has been often explained in case law, which will therefore be examined also.

Furthermore, in this chapter, I will examine whether architects are obliged to provide a design that is eligible to obtain a building license. After all, if the architect provides a design that does not meet the requirements to achieve a building license, the architect may be liable because he has not observed the applicable laws and rules.

Illustration 1: *An architect was asked by a client to design a garage. The architect was to make sure that this design complied with the requirements to obtain a building license for that garage. Furthermore, the architect was to obtain the building license.*

Illustration 2: An architect was commissioned to build a house on certain construction site. The neighbours of the client had the right of servitude on part of the building site on which the house was to be built. The architect may be obliged to take this into account when drafting the design. If the architect could have suspected any problems as to the servitude (because a footpath was crossing the construction site for example), the architect may be obliged to consult the register in order to find out the legal status.

352 See for instance PEL/*Barendrecht/Jansen/Loos/Pinna/Cascão/Van Gulijk*, SC, pp. 650-652.

2. The Netherlands

Basically, Dutch architects have to provide a legally feasible design.[353] In order to provide such design, architects should have distinguished specific knowledge of certain aspects of the law. According to Article 11 Section 4 SR 1997[354], architects have to take into account public- and private-law rules that are considered common knowledge for architects.[355]

For example, architects have to observe public regulations, such as the Housing Act (*Woningwet*), the Spatial Planning Act (*Wet op de Ruimtelijke Ordening*), the Urban and Rural Regeneration Act (*Wet op de stads- en dorpsvernieuwing*), the Monuments and Historic Buildings Act (*Monumentenwet*), the Working Conditions Decree (*Arbeidsomstandighedenwet*), and requirements regarding the external appearance of buildings (*Welstand*)[356]. Furthermore, they should observe technical rules of the Building Decree and the rules of the zoning scheme. According to recent case law, architects are responsible for complying with the requirements of this zoning scheme in their design.[357] Besides these public regulations, some private regulations should be taken into account as well, for instance statutory rights and duties between neighbours, and rules on servitudes.[358]

Generally, the duty to take into account applicable laws and rules is an obligation of means in the Netherlands.[359] Although architects have to be well acquainted with the relevant laws and rules, they do not have to *warrant* a legally feasible design.[360] However, according to case law, architects have to provide a design that is *eligible* for achieving a building license. They are not under an obligation to *guarantee* that the design they provide is eligible for achieving a building license, but this indicates strict

353 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 269.

354 This article corresponds to Article 11 Section 4 DNR 2005.

355 See AIBk 18 May 1993, *Bouwrecht* 1995, p. 616: it is the architect's duty to provide building specifications and drawings that in all respects comply with the public-law requirements and rules. If the architect has the obligation to supervise (see Chapter 10) the realisation of the works as well, he has to check whether these rules are being observed by the building contractor. See on this latter issue also AIBk 16 August 2000, *Bouwrecht* 2001, p. 253.

356 See for instance AIBk 19 April 2005, No. 1200-0301 where it was determined that the aesthetic value of a design should be left aside. A design has to comply with certain requirements regarding the external appearance of buildings, however.

357 AIBk 23 April 2007, *Bouwrecht* 2007, p. 1067; AIBk 26 June 2007, *Bouwrecht* 2007, p. 1059.

358 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 268.

359 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 268.

360 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 268; Cremers/Zonderland, 1969-1978, part B, IV, nos. 15-18; Van Wijngaarden and Chao-Duivis, 2004-9, no. 490; Bruggeman, 2007, p. 45.

liability though.[361] This is because architects are expected to observe the publicly known laws and rules (as described in the first paragraph) as these are crucial for achieving a building license.[362] So, generally, negligence liability applies but regarding the publicly known laws and rules architects are under an obligation of result.

It often occurs that architects have to deal with certain complex legal problems when they perform this duty to advise on applicable laws and rules. At first sight, these legal problems prevent from getting a building license for the design. However, often architects can request an exemption so that the building license can yet be granted. In that situation, the architect's obligation is of means; he should do his best to get such exemption. Obviously, architects are not under an obligation of result because whether or not they are granted an exemption for their design depends on circumstances that are beyond the architect's control, such as the willingness of government agency's to cooperate and possible objections of local residents.[363]

To illustrate above, in a 1977 case the client's building plans could not be easily carried out because of a legal obstruction. Despite information of the architect about this legal obstruction, the client wanted to proceed with his building activities, however. Therefore, in this case the architect was only held liable under an obligation of means regarding the measures he had to take to remove the legal obstruction. He was not held liable for not being able to provide a design that was fit for obtaining a building license.[364]

3. Belgium

According to Article 17 *Reglement van Beroepsplichten*, Belgian architects have to advise on applicable legislation, the *Woningbouwwet* (House Building Act) for example. This is rather a general obligation but following Article 6 Section 2 *Deontologische norm nr. 2*, architects have to check public-law regulations on servitudes, preservation of monuments, and licenses (environmental or urbanistic).[365]

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361 RvA 19 December 1985, *Bouwrecht* 1987 p. 247; AIBk 19 July 2002, *Bouwrecht* 2003 p. 729; AIBk 1 October 1996, *Bouwrecht* 1997, p. 161; Cremers/Zonderland, 1969-1978, part B-IV, no. 15.

362 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 268.

363 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 268.

364 AIBk 19 December 1977, *Bouwrecht* 1978 p. 445.

365 Deketelaere, Schoups, and Verbeke, 2004, no. V.175; Baert, 2001, no. 1171; *Hof van Cassatie* 8 November 1974, *Arresten van het Hof van Cassatie* 1975, p. 315; *Hof van Beroep Gent*, 24 June 1988, *Rechtskundig Weekblad* 1990(91), pp. 262-264; *Hof van Beroep Gent*, 9 December 1994, *Rechtskundig Weekblad* 1995(96), pp. 90-91; Deketelaere, Schoups, and Verbeke, 2004, no. V.182; Baert, 2001, nos. 1180-1182; Burssens, 2001, no. 434.

As we have seen with Dutch law, Belgian architects have to provide a design that meets the requirements of achieving a building license, if such building license is required for the realisation of the construction project. In that respect, according to case law, it is the exclusive task of architects to make sure that the design complies with the applicable administrative and urbanistic laws and rules.[366] If, for example, an architect is mistaken about an advise given by the Council of Monuments and Landscapes (*Dienst Monumenten en Landschappen*), which he read like a disapproval of the design, the client who read the advise as a denial after the request for a building license is not malicious. The architect in this case had replied that the local authorities did not have a copy of the register of conservated monuments and village or urban areas at their disposal. However, it was determined that the architect could have addressed different authorities to look into their registers of conservated monuments and village or urban areas, or to ask for a certificate. In that case, he would have known that the building site was not protected.[367]

If the architect is not able to provide a design that complies with the applicable administrative and urbanistic laws and rules, he is not entitled to remuneration. This is different, however, in the situation that governmental agencies disapprove of the design for some reason (other than non-compliance with the relevant rules and laws).[368] This seems to indicate an obligation of result for architects to observe (in any case) the administrative and urbanistic rules and laws that are in particular relevant to the design.

Besides these applicable administrative and urbanistic laws and rules, Belgian architects also have to observe specific rules on construction law, urbanism, and hygiene.[369] They have to inform the client about all regulations that may apply to the design activities.[370] For instance, architects also have to inform the client about his social and fiscal obligations regarding the construction.[371] However, architects are no legal advisors.[372] Neither is it the architect's duty to investigate whether the client is entitled to a building grant either.[373]

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366 Gent, 9 December 1994, *Rechtskundig Weekblad*, 1995-1996, 90: *"Het is bij uitsluiting de architect die ervoor zorgt dat zijn ontwerp conform de administratieve en stedebouwkundige normen en reglementen is."*

367 *Hof Gent* 9 December 1994, *Rechtskundig Weekblad* 1995-1996 pp. 90-91.

368 Article 10 *Deontologische Norm* no. 2; Rigaux, 1993, nos. 223-224.

369 Rigaux, 1993, no. 223; *Brussel*, 6 December 1973, *Res et Jura Immobilia*, 1974, p. 85; *Luik*, 20 March 1974, *Jursiprudence de Liège* 1974-1975, p. 33.

370 *Hof Gent* 3 May 1996 *Rechtskundig Weekblad* 1999-2000, p. 223.

371 Baert, 2001, no. 1180.

372 Goossens, 2003, pp. 809-810; *Brussel* 26 November 1998, *Tijdschrift voor Aannemingsrecht* 1999, p. 322.

373 *Hof Gent*, 16 February 1988, *Tijdschrift voor Aannemingsrecht* 1990, p. 96. See also Burssens, 2001, no. 434.

In this respect, as in Dutch law, Belgian architects just have to do their best and therefore are under an obligation of means towards the client.[374] After all, the architect's obligation to be acquainted with the relevant laws and rules and to inform the client thereof is covered by the general obligation of architects to advise and assist the client. This is a clear obligation of means according to literature.[375] The fact that an architect can not obtain a building license for his design is not considered as a *force majeure.* According to case law however, if for the realisation of the works a building license is required, the architect is hired under a design contract on the condition that he will obtain a building license.[376]

4. France

French architects also have the obligation to observe laws and rules that apply to the design so that the project envisaged by the client can be realised.[377] Generally, architects have to provide a design that is technically, legally, and financially practicable.[378]

In particular, they should have specific knowledge about applicable urbanistic and building regulations *(régles d'urbanisme)*[379], regulations on building licenses[380], servitude rules[381], plot rules, civil and fiscal regulations, and regulations regarding joint ownership.[382] Furthermore, the architectural and technical choices of the design have to conform to the applicable building regulations.[383] If an architect has doubts whether the project is legally feasible, he has to inform the client about that.[384]

As we have seen in the other countries, the non-performance of this duty to observe applicable laws and rules may lead to a design that is not fit to

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374 Burssens, 2001, no. 437.

375 Deketelaere, Schoups, and Verbeke, 2004, no. V.189; Burssens, 2001, no. 437; Baert, 2001, nos. 1171-1182.

376 Burssens 2001 no. 479; Brussel 21 November 1979, *Journaux Tribunal* 1980, 279.

377 *Cour de Cassation Civile* 3, 14 February 1973: *Bulletin civile* 1973, III, no. 126. *Cour de Cassation Civile* 3, 9 December 1992: *Bulletin civile* 1992, III, no. 318.

378 Darnet, Depuy, and Gendre, 2005, p. 101.

379 For example R. 111-2 to 111-26.

380 Articles L. 421-1 to 421-9 and L. 422-1 to 422-5. According to L. 421-1, a building license is necessary for each *constructeur*, for each building (either new of existing), and for each construction field. However, for dispositifs publicité-enseignes, works of little importance (less than 2 m^2 and 1,50 m height), and enclosures of less than 2 metres, a building license is not required (R. 421-1); Darnet, Depuy, and Gendre, 2005, p. 67. See also Chapter 3, Section 4.

381 Articles 637 to 710 *Code Civil*; *Cour de Cassation* 3, 20 February 2002: *Responsabilité civile et assurance* 2002, comm. 171.

382 Darnet, Depuy, and Gendre, 2005, pp. 51, 67, 102; Auby and Périnet-Marquet, 1992, no. 1163; Dalloz, 1998, nos. 30-34.

383 Darnet, Depuy, and Gendre, 2005, p. 67.

384 Darnet, Depuy, and Gendre, 2005, p. 102.

obtain a building license. If so, French architects are strictly liable towards the client if they have not complied with the *règles d' urbanisme*.[385] This indicates that French architects are under an obligation of result towards the client regarding their obligation to observe the applicable *régles d'urbanisme*.[386] However, as in the Netherlands and Belgium, they are not obliged to *guarantee* that their design is qualified to obtain a building license. Existing case law on this duty is severe; architects can not easily exonerate from liability towards the client for the non-performance of this duty.[387] For instance, an architect who had not observed the applicable urbanistic and building regulations was held liable for the related damages.[388]

5. Germany

According to case law, German architects are considered experienced advisors and trustees of the client.[389] In this function, German architects certainly have to be familiar with the basic rules that apply to *Planungsrecht* (architect law), such as the *BauGB*, *BauNVO*, *BauGB-MassnahmenG*, *Investitionserleichterungs- und WohnbaulandG*, and the general *Bauordnungsrecht*.[390]

In practice, architects are only required to inform the client about applicable *öffentlich-rechtlichen* rules, such as *Bauplanungs-* and *Bauordnungsrecht* (rules on the planning and regulation of buildings) and urbanistic rules.[391] For example, German architects have to advise on neighbourhood problems.[392] However, architects can also be obliged to advise on other specific rules such as environmental rules and energy saving regulations, if this has been explicitly required by the client in the individual design assignment. This is similar as to what applies in the other countries examined.

According to the HOAI, *Leistungsphase* 2 and 8, and § 34 paragraph 1 *BauGB*, the design should be *genehmigungsfähig*, which means that the design should comply with the relevant public and private regulations and

385 Huet, 2004, pp. 36-37.

386 Only in case of a *cause étrangère* architects can exonerate from this liability. For instance, in case of defects regarding the tiles of a car park that were solely caused by exceeding the limits of the assignment, the duly proven bad use of the car park by the co-owners unit, constituted a *cause étrangère* that exonerated the architect of his liability. *Cour de Cassation Civile* 3, 8 July 1998: *Revue du Droit Iimmobilière* 1998, p. 640. See Chapter 11 for more on exclusion and limitation of liability.

387 See Darnet, Depuy, and Gendre, 2005.

388 *Cour de Cassation Civile* 3, 28 October 2003, Fradin c/ Léonard, *Juris-Data* no. 020769.

389 *Bundesgerichtshof, Schäfer/Finnern*, Z. 3.00, p. 52. Niestrate, 2003, no. 346: *Bundesgerichtshof, Neue Juristische Wochenschrifte* 1980, 2576.

390 Niestrate, 2003, no. 348.

391 Löffelmann/Fleischmann, 2007, nos. 277, 304; Leineweber, 2000, no. 532.

392 Niestrate, 2003, no. 258.

therefore be eligible to obtain a building license.[393] If the architect's design is not *genehmigungsfähig*, it is defective.[394]
In constant case law it has been established that architects have to guarantee (*einstehen*) that the *anerkannten Regeln der Technik und Baukunst* have been complied with.[395] These *anerkannten Regeln der Technik und Baukunst* are publicly known rules that architects in any case should now of; they are considered the *Mindeststandard* that architects at least should comply with.[396] If the architect wants to dissent from these *anerkannten Regeln der Technik und Baukunst*, however, he has to inform the client about the risks that are involved with this decision.[397]

It can be that the architect can not provide a design that is *genehmigungsfähig* due to certain legal problems.[398] If the architect in such situation can prove that he will be granted an exemption for the design however, he is not liable towards the client if, despite reasonable efforts, the exemption is not granted. As in the Netherlands and Belgium, this indicates that German architects are under an obligation of means to provide a design that is fit to obtain a building license.[399] They should, however, inform the client if there is any uncertainty about whether or not the design is fit for obtaining a building license.[400] If it is uncertain whether the design will be fit for obtaining a building license, the architect still has to deliver a design that is *genehmigungsfähig*.[401]

As in the other countries, architects are neither lawyers nor fiscal advisors.[402] So if the legal issues of the project are getting too complicated for an architect, he has to advise the client to engage a legal advisor.[403] If an architect advises the client to hire a legal advisor to assist at this stage, he is not liable if the client refuses and the design is not qualified for a building license.[404]

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393 Löffelmann/Fleischmann, 2007, nos. 277, 304; Locher, 2005, no. 374; Busch, 2007, pp. 317, 319; *Bundesgerichtshof, Neue Zeitschrift für Baurecht* (NZBau) 2003, 38.

394 Locher, 2005, nos. 396ff; Niestrate, 2003, nos. 55-63; Leineweber, 2000, no. 532.

395 Locher, 2005, no. 400; *Bundesgerichtshof, Baurecht* 1985, 567. See Chapter 4 as well.

396 Niestrate, 2003, no. 24; Busch, 2007, p. 317; Falke, 2000, pp. 177f; *Oberlandesgericht Düsseldorf, Baurecht*, 1996, 287; *Bundesgerichtshof, Neue Juristische Wochenschrifte - Rechtsprechungs Report* 1995, p. 472.

397 Löffelmann/Fleischmann, 2007, no. 335; Busch, 2007, p. 318.

398 Leineweber, 2000, no. 532.

399 Niestrate, 2003, no. 58.

400 Leineweber, 2000, no. 532.

401 *Bundesgerichtshof, Baurecht* 1999, 1195.

402 Niestrate, 2003, no. 245; Leineweber, 2000, nos. 130-131; KG, 20 March 2006, *Baurecht* 2006, 1928.

403 Niestrate, 2003, nos. 258 and 345ff; *Bundesgerichtshof, Versicherungsrecht* 1992, 698-700; *Bundesgerichtshof, Neue Juristische Wochenschrifte* 1995, 1692.

404 Niestrate, 2003, no. 351.

6. England

According to English literature, architects are under the general duty to ensure that the design is fulfilled according to the relevant statutory regulations.[405] Therefore, they must have sufficient knowledge of those principles of law that are relevant to his professional practice in order to reasonably protect their client from damage and loss.[406] The exact meaning of sufficient knowledge is a matter of degree.[407]

At least, it will include all statutes and regulations affecting the building, the main principles of town and county planning, private rights likely to affect the works, and the standard forms of building contracts. In particular, architects have to observe the Building Regulations.[408] Furthermore, the Building Act 1984 and the Construction (Design and Management) Regulations 1994[409] impose requirements on designers. Finally, architects are required to know the most important clauses of frequently applied construction contracts, such as the ICE and JCT Conditions of Contract, particularly if they are contracted under these conditions by the client.[410] As in the other countries, this indicates that English architects are under an obligation of result.

In case law, further requirements have been established. According to *Bevan Investments Ltd v Blackhall and Struthers*[411], for example, if an architect departs from the provisions of a relevant code or regulations, the design is faulty unless the architect can prove that it conforms to accepted practice. The architect then has to prove that the design is consistent with the purposes of this code or regulation, in particular with safety requirements.
Furthermore, according to *Jenkins v Bentham*[412] architects are required to know the general rules that apply to the valuation of ecclesiastical property. They are negligently liable if they relied on the interpretation by the local authority of planning legislation, which turns out to be wrong. However, in

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405 James, 2002, pp. 151, 161; *Holland Hannen Ltd. v. Welsh Health Technical Services Organisation* (1981) 35 Building Law Reports 1. See also SFA/99 under 2.03 and 2.09

406 Furst and Ramsey, 2006, no. 13-034; Wallace, 1995, nos. 2.146 and 2.155. *Townsend (Building contractors) Ltd. v. Cinema News* (1959) 1 Weekly Law Reports 119.

407 *Townsend v. Stone Toms* (1984) 27 Building Law Reports 26. According to *Holland Hannen Ltd v. Welsh Health Technical Service Organisation* (1981) 38 Building Law Reports 1, architects are not to slavishly follow a code of practice without taking into account their relevance to the project.

408 James, 2002, p. 161; Uff, 2005, p. 509f.

409 SI 1994, no. 3140.

410 Furst and Ramsey, 2006, no. 13-034.

411 *Bevan Investments Ltd. v Blackhall and Struthers* (1973) 2 New Zealand Law Review 45, pp. 65-66.

412 *Jenkins v Bentham* (1855) 15 *CB* 168 at 189.

B.L. Holdings v Wood[413], it was established that it can be reasonable that, regarding a difficult point of law, architects rely on the planning authority's interpretation.
As in all other legal systems examined in this Chapter, architects are no legal advisors and are therefore not under strict liability.[414] If an architect feels that he lacks the required knowledge of the relevant laws and rules he should advise the client to hire a legal advisor.[415]

7. Summary

In all countries that were examined, architects generally have to observe the rules and laws that apply to designing and construction. Therefore, they should have adequate knowledge of the rules and laws that are relevant to the design. In particular, architects are required to observe the laws and rules that are publicly known, such as building regulations and the Housing Act. Architects are expected to know about these laws and rules. These rules and laws are essential in order to be able to provide a design that is fit to obtain a building license. They are considered as a minimum level of what architects are expected to observe when providing a design. In all countries, architects are under an obligation of result regarding this obligation. In Germany, even stronger, architects have to guarantee that the design they provide complies with this *Mindeststandard*, the *anerkannten Regeln der Technik und Baukunst*.

Architects also have to take into account private-law rules such as servitude rules, plot rules, and rules on neighbourhood problems. Furthermore, in individual design contracts clients and architects can agree that other rules have to be observed by the architect also, for instance specific environmental or safety regulations. In addition, clients may ask architects in the individual design contract to advise on other specific rules, such as energy-saving rules. English architects also can be required to have sufficient knowledge of the frequently applied conditions of contract to construction contracts, such as the JCT and ICE Conditions of Contract.

Architects are not obliged to *guarantee* that the design they provide is eligible to obtain a building license. Architects are under an obligation of means to provide a design that is eligible to obtain a building license. In this respect they have to observe a minimum level of publicly knows laws and rules. In particular, in the Netherlands and Germany it has been established that in case of legal obstructions that may prevent the design from obtaining

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413 *B.L. Holdings v Wood* (1979) 12 Building Law Reports 1, Court of Appeal. See also *Dunlop v Woollahra Municipal Council* (1982) Appeal Cases 158 – PC.

414 Wallace, 1995, no. 2.152.

415 Furst and Ramsey, 2006, no. 13-034.

a building license, architects are just under an obligation of means to try to get an exemption so that the building license can yet be obtained.

Finally, in each country, it has been established in case law that architects are no legal advisors; the scope of their duty is not that extensive. If certain legal issue are getting too complex, they should advise the client to hire a legal expert to solve this particular problem.

Architect Liability

Country / Duty	Netherlands	Belgium	France	Germany	England
Duty of Care	Negligence	Negligence	Negligence	Negligence	Negligence
Examination of the Building Site	Negligence	Strict	Strict	Strict	Negligence
Advise on Selection of Materials	Negligence	Negligence/ Strict	Strict	Negligence	Negligence
Advise on Applicable Law and Rules	Negligence/ Strict	Negligence/ Strict	Strict	Negligence/ Strict	Negligence/ Strict

CHAPTER 8 Advise on Construction Costs

1. Introduction

Within the limits of a design contract, architects have to give an estimation of the costs of the design. In particular, architects may have to estimate the drafting costs, the costs of preparing the building site, and the costs of the realisation of the design. The purpose of this obligation is that clients are able to consider whether or not the design fits their (financial) situation. Basically, architects have to take into account the client's budget financial means and stay within the limits of this budget.

In this chapter, I will examine how far the architect's obligation to estimate the construction costs reaches according to national laws and rules, and whether or not (small) exceeding of the costs estimation by the architect is allowed, and if yes, to what extent.

Illustration: *A consumer contracted an architect to design a conservatory. It is in the interest of the client that the architect provides the client with an (preliminary) estimation of the aggregate costs. Otherwise, the design may prove to be unfeasible at the building contractor's quotation.*

2. The Netherlands

Dutch architects have to provide a design that is financially achievable.[416] According to the SR 1997[417] and DNR 2005[418], architects have to see to it that, at the start of the design assignment, they are well informed about the client's budget financial means that is approximately (*ten naaste bij*) involved with the realisation of the project. The phrase 'approximately' indicates that architects can not be expected to foresee every situation that may influence the price fixing. This will depend on the specific project therefore.[419]

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416 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 267; Chao-Duivis, Koning, and Leijgraaf, 2004, p. 36; Articles 3 en 5 RVOI-2001.

417 Article 2 Sections 3, 4, 6, and 8 SR 1997; Chao-Duivis, Koning, and Leijgraaf, 2004, p. 37.

418 Articles 2 Sections 3, 3j, and 4 DNR 2005.

419 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 267. See for instance, AIBk 24 November 2004, No. 1200-0327 (architect was negligent because he had not succeeded in providing a design that could be carried out *ten naaste bij* the constructed sum that was agreed upon with the client) and AIBk 13 December 2004, No. 1200-0344 (to provide a provisional cost estimation is one of the standard tasks of an architect); Chao-Duivis, 2006, pp. 328-329.

So they have to inform themselves about the client's budget financial means before drafting a design. Because the building process also involves other people than architects, architects are expected to estimate the costs as best as they can.[420] Clients, on the other hand, have to provide the architect with the necessary information about their budget financial means.[421] But even if the client himself is capable to estimate the construction costs, architects are still obliged to provide the client with cost estimations.[422]

If an architect is not sure whether the aesthetical wishes and the financial possibilities of the client match, he has to explicitly inform the client about that. If not, the architect may be in default.[423] However, if the client has not made clear that the project is unfeasible for the budget he had in mind, the architect is not liable.[424] But, usually, architects watch over the budget as was agreed with the client. Clients may expect architects to hand over adequate information that enables them to determine the project's feasibility.[425]

Sometimes, it is difficult for architects to provide this adequate information, however, for example if the project concerns the restoration and renovation of existing real estate.[426] In a 2002 case, an architect was unable to do reliable cost estimations and had to await the building contractor's offers. Therefore, the architect could only give more precise cost estimations after several stages of the works had been performed. Although the serious overrun of the client's budget was not imputed to the architect, the fact that he did not inform the client of the unreliable cost estimations caused the architect's liability under the negligence rule.

It often occurs that the estimated costs are being exceeded with a certain percentage of the initial estimation. However, neither the SR 1997 nor the DNR 2005 mentions a percentage that is allowed for an acceptable cost overrun. It seems to depend on the individual design contract whether or not certain costs excess is allowed. In budget overrun situations, Article 15 Section 1 SR 1997 provides the following rule: "*Blijkt het ontwerp van de architect niet te kunnen worden uitgevoerd voor ten naaste bij de tussen partijen schriftelijk overeengekomen bouwkosten en kan dit de architect worden verweten, dan is de architect slechts gehouden zijn ontwerp te herzien zonder berekening van*

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420 Explanation to the Agreement Client – Architect, Engineer, and Advisor (*Toelichting op de Rechtsverhouding opdrachtgever – architect, ingenieur en adviseur* DNR 2005), Article 11, Section 2.

421 Such an obligation has been established in Article 6 paragraph 3 RVOI-2001 for instance.

422 AIBk 16 January 2004, *Bouwrecht*, 2005, p. 155.

423 AIBk 14 November 2003, *Bouwrecht* 2004, p. 794; RvA 21 December 2001 *Bouwrecht* 2002, p. 442; AIBk 6 October 2004, *Bouwrecht* 2006, p. 386; AIBk 13 December 2004, No. 1200-0344; see also Chao-Duivis, 2006, pp. 331-332.

424 In AIBk 31 August 2001, *Bouwrecht* 2002, p. 906, AIBk 20 May 1999, *Bouwrecht* 2000, p. 82.

425 AIBk 16 February 2004, *Bouwrecht* 2005, p. 155.

426 AIBk 1 February 2002, *Bouwrecht* 2002, p. 1051.

extra advieskosten."[427] The phrase 'culpable' again shows that architects are under an obligation of means.

According to this rule, architects may thus be obliged to provide a second design at their own expenses, if the first one does not comply with the client's budget financial means.[428] But if both the first and the second (revised) design are financially impracticable, architects have failed to perform the design assignment according to the client's wishes.[429] In that case, consumer-clients may dissolve the agreement with the architect, according to Article 31 Section 3 SR 1997. Clients who are not consumers (for instance legal entities), may cancel the contract if in due course the design proves to be impracticable and the architect is liable for this.[430]

Finally, architects are obliged to check the building contractor's financial accounts. However, according to case law, they are not easily held liable if they advise to assign the works to a building contractor who, afterwards, turns out to be insolvent. Two cases are important in this regard.

In the first case, an architect had recommended a building contractor who went bankrupt shortly after the allotment. The client had already paid him 30.000 guilders. It was determined that, generally, architects are not liable if the building contractor they recommend goes bankrupt. However, in this case, the building contractor's price was 25 % under the local authorities' price, whereas other applicants largely exceeded this price. Therefore, the architect in this case should have inquired whether this building contractor was reliable. All the more since, at that time, many building contractors were having financial problems and the building contractor had asked for considerable payment in advance.[431]

In another case, the building contractor who was recommended by the architect also went bankrupt after the allotment. In this case, the architect had checked the building contractor's references but as he had been charged with only *incidenteel toezicht* (occasionally supervision, see Chapter 10 for more on supervision) he was not held liable for not having detected the building contractor's financial problems.[432]

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427 "Should it prove impossible to realise the design of the architect for approximately the sum to which both parties agreed in writing, through a culpable fault of the architect, the architect is only required to amend his design without further payment." Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 267. In AIBk 31 October 1994 *Bouwrecht* 1996, p. 103, client and architect agreed upon a maximum construction sum, which permits the client to rely on a design that corresponds with this sum.

428 See for instance *Gerechtshof's-Gravenhage*, 22 November 2000, *Bouwrecht* 2001, p. 602.

429 Article 2, Section 3, under d SR 1997; RvA 21 December 2001, *Bouwrecht* 2002, p. 442; AIBk 31 August 1992, *Bouwrecht* 1994 p. 619; AIBk 12 December 1994, *Bouwrecht* 1996, p. 601.

430 Article 29 SR 1997; Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, pp. 278-279; Van Wijngaarden and Chao-Duivis, 2004-11, no. 598.

431 AIBk 15 January 1986, *Bouwrecht* 1986, p. 373.

432 AIBk 21 December 1998, *Bouwrecht* 2000, p. 79.

3. Belgium

According to Article 16 *Reglement van Beroepsplichten*, Belgian architects have to estimate the construction costs in order to provide a design that stays within the limits of the assignment and the budget financial means of the client.[433] Therefore, architects are required to inquire about the client's budget.[434] Clients, on the other hand, have to inform architects about their budget financial means.[435] This is similar to the Dutch rules on this duty.

The obligation to estimate the construction costs is not so strict that architects have to guarantee that the client's budget is sufficient for the realisation of the works. Both the architect and the client have an obligation to inform each other.[436] Every change of plans, during the design activities or during the realisation of the design, must be included in the contract because it may involve financial changes for the client as well.[437] Furthermore, according to case law, architects may have to check on the building contractor's financial accounts and the expected costs of the assignment[438] and they may have to consult with specialists in the specific field.[439]

If the initial estimation of the costs appears inadequate for the realisation of the design, an architect is not liable in any case. For example, if the realisation of the works is considerably delayed due to constant changes and modifications by the client, architects are not held liable.[440] According to literature, margins of 10 to 15 % regarding the architect's cost estimation are generally accepted.[441] Usually, both parties allow for a possible increase of the costs in the contract.[442] Architects are not liable if they notified the client about a possible budget overrun and the client did not respond disapprovingly.[443]

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433 See also Deketelaere, Schoups, and Verbeke, 2004, no. V. 65.

434 Burssens, 2001, no. 49; Meert and Verbeke, 2004, p. 8.

435 *Hof van Cassatie* 19 March 1992, *Arresten van het Hof van Cassatie* 1991-1992, p. 701.

436 Burssens, 2001, no. 420.

437 Burssens, 2001, no. 49; Deketelaere, Schoups, and Verbeke, 2004, no. V. 65.

438 Rigaux, 1993, nos. 291-300; Burssens, 2001, no. 437.

439 Deketelaere, Schoups, and Verbeke, 2004, no. V.188. According to *Hof Gent* 16 February 1988, *Tijdschrift voor Aannemingsrecht* 1990, p. 96, the architect's duty to advise does not cover the issue whether clients are entitled to a building grant or not.

440 *Rechtbank van eerste aanleg Brussel*, 26 January 1996, *Res et Jura Immobilia*, 1995, p. 255.

441 Burssens, 2001, no. 49.

442 Rigaux, 1993, nos. 217f.

443 Rigaux, 1993, no. 218.

4. France

Like Dutch and Belgian architects, French architects also have to provide a design that corresponds to the client's budget financial means.[444] If architects are concerned whether the client's budget is sufficient to realise the design project, they have to inform the client about that.[445] The architect's obligation to estimate the costs has been established in *le devis estimatif* (estimation of the costs), which provides detailed price estimations. It enables the client to establish his budget for the project.

The architect's non-performance of his obligation to estimate the costs may cause his liability under negligence towards the client.[446] Architects have to notify the client of the costs that are involved with the project so that their client can get financially organised taking into account the architect's costs estimation. Architects have to provide the client correct cost estimations.[447] However, if an architect was not explicitly charged to estimate the costs of the project, he is not obliged to inquire the client about his budget financial means.[448]

The architect's *estimation globale* (approximate estimation) may not differ too much from the actual costs.[449] However, the estimation of the costs may not be considered as a fixed price, which may never be exceeded. In literature, a 15 to 20 % margin has been mentioned and seems allowed.[450] According to case law, an excess of the actual costs with twice the estimated costs is definitely not allowed.[451]

5. Germany

German architects should also estimate the construction costs and inform clients about any irregularities.[452] The specific duty to comply with financial requirements has been established in *Leistungsphasen* 2 and 3 of the HOAI.

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444 Darnet, Depuy, and Gendre, 2005, pp. 35, 51.

445 Article 36 Section 1 *Code de déontologie des Architectes*; Huet, 2004, p. 135.

446 Auby and Périnet-Marquet, 1992, no. 1158; Darnet, Depuy, and Gendre, 2005, p. 93.

447 Huet, 2004, p. 134.

448 *Cour de Cassation Civile* 3, 1 December 1999, "*L'Étoile verte*", no. 1812 P, *RDI* January-March and April-June 2000.

449 Saint-Alary and Saint-Alary-Houin, 2003, p. 143.

450 Auby and Périnet-Marquet, 1992, no. 1158.

451 Auby and Périnet-Marquet, 1992, no. 1158; Liet-Veaux and Thuilier, 1994, pp. 280-281; *Versailles*, 30 May 1989, *Revue trimestrielle de droit immobilière* 1989, p. 469; *Cour de Cassation Civile* 3, 22 April 1971, *Bulletin Civile*, p. 174; *Cour de Cassation Civile* 3, 25 February 1975, *Bulletin Civile* III, p. 55; *Cour de Cassation Civile* 3, 15 December 1981, *Juridique Notariale et Immobilière* 1982, p. 91; *Cour de Cassation Mixte*, 16 January 1976, *Gazette du Palais* 1976-I, p. 66.

452 Löffelmann/Fleischmann, 2007, nos. 146, 230-236; Leineweber, 2000, no. 543.

Generally, German architects have to indicate the foreseeable costs to the client. In addition, in *Leistungsphasen* 7 and 8 HOAI, more detailed rules have been established.[453] Accordingly, the architect's calculations have to include a report of necessities and explanations regarding the design.[454] Amounts and uniform prices do not have to be included. It is sufficient to mention the most important works and the main costs.[455] The estimation has to be as careful and precise as possible in order to allow the client to foresee the construction costs.[456] This shows that German architects are under an obligation of means regarding this duty.[457]

As in the other countries, the purpose of the estimation and calculation of the costs is to provide the client with transparency and certainty regarding the future construction costs. In this way, the client can control price increases and take measures to reduce unexpected expenses.[458] Before the actual works start, only the final outline of costs described in *Leistungsphase* 7 is required.[459]

In § 15-2 HOAI, four stages regarding the estimation of the costs have been established; *Kostenschätzung, Kostenberechnung, Kostenanschlag,* and *Kostenfeststellung* (estimation of the costs, calculation of the costs, outline of the costs, and establishing the final costs).[460] However, it depends on the individual design contract whether architects should perform all of these inquiries.[461] If the contract includes clear agreements on these *Kostenermittlungen* (investigations of the costs), which seems common in Germany, architects are liable if they have not (completely) performed these investigations.[462]

If architects exceed the client's budget, however, certain margins apply.[463] Architects can deviate from the actual costs up to 10 to 30 %, depending on the phase of the design. A 30 % tolerance will only be allowed during the first estimation, however. Regarding the final *Kostenanschlag*, architects may

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453 See Werner/Pastor, 2008, no. 1784.

454 In practice, the architect's cost estimation is often exercised by applying the DIN 276 *Teil* 3 form; Löffelmann/Fleischmann, 2007, nos. 167, 231, 459.

455 Löffelmann/Fleischmann, 2007, nos. 459-465; Locher, 2005, nos. 424ff.

456 Löffelmann/Fleischmann, 2007, nos. 146; Bindhardt/Jagenburg, 1981, § 5 no. 10ff; *Bundesgerichtshof*, 11 November 2004, *Baurecht* 2005, 400ff.

457 Only if architects and client contractually agree that he architect guarantees the *Einhaltung der veranschlagten Baukosten*, which is called *Baukostengarantie*, the architect is strictly liable towards the client. However, this is an exception to the rule that architects are under an obligation of means. See for more on this *Baukostengarantie* Werner/Pastor, 2008, nos. 1777f.

458 Löffelmann/Fleischmann, 2007, nos. 146.

459 Niestrate, 2003, no. 20; *Oberlandesgericht Düsseldorf*, 23 December 1980 *Baurecht* 1981, p. 401.

460 Locher, 2005, no. 430; Werner/Pastor, 2008, no. 1776.

461 Niestrate, 2003, nos. 21-23.

462 Niestrate, 2003, no. 22.

463 Niestrate, 2003, no. 39; *Bundesgerichtshof* 16 December 1994, *Baurecht* 1994, p. 268.

only deviate up to 10 % of the actual costs.[464] However, these margins cannot be applied to overlooked costs, miscalculations or obvious mistakes in the costs estimation. These shortcomings will lead to non-performance of the architect's duty.[465]

Finally, if architects are aware of financial problems of the building contractor, they are expected to inform the client thereof. This is not an explicit duty, however. Architects may also have the obligation to advise the client on cost saving measures.[466] German clients may require architects to advise on fiscal issues, but as in the other countries that were examined, the architect is not a financial or tax expert.[467]

6. England

Usually, there is either an express or implied condition of the client to require architects to estimate the costs of the proposed works. Architects owe a duty to design a work that is capable of being carried out at reasonable cost.[468] This means that architects have to provide a careful estimation.[469] In *Moneypenny v Hartland*[470], for example, the architect was held liable because he had estimated the costs substantially less than the lowest tender.[471]

Clients can impose limits on the cost of the construction project. The mere fact that the costs exceed the estimate is not sufficient to establish a breach of duty, according to *Copthorne Hotel (Newcastle) Ltd v Arup Associates*[472].[473] It is established case law that if the cost estimate is so serious that the services amount to a total failure of consideration and are of no value to the client, the architect is not entitled to his fee.[474] This clearly indicates an obligation of means.

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464 Löffelmann/Fleischmann, 2007, nos. 2122f, 2145; Niestrate, 2003, no. 39; Locher, 2005, no. 433.

465 Werner/Pastor, 2008, no. 1780; Löffelmann/Fleischmann, 2007, nos. 2122f ; Leineweber, 2000, no. 544; *Bundesgerichtshof* 13 February 2003, *Baurecht* 2003, 1061f.

466 Locher, 2005, no. 462.

467 Niestrate, 2003, nos. 245f, 251-273; Locher, 2005, nos. 463f; Löffelmann/Fleischmann, 2007, no. 147. See also *Oberlandesgericht Düsseldorf*, 16 December 2003, *Baurecht* 2004, 1024f.

468 Wallace, 1995, no. 2-156.

469 Furst and Ramsey, 2006, no. 13-036.

470 *Moneypenny v Hartland* (1826) 2 *Car & P*, 378.

471 See also *Flannagan v Mate* (1876) 2, Victorian Law Review 157 for a similar situation.

472 *Copthorne Hotel (Newcastle) Ltd v Arup Associates* (1998) 58, Construction Law Review, 103 at 125.

473 Furst and Ramsey, 2006, no. 13-036.

474 Wallace, 1995, no. 2-159.

7. Summary

In each country examined, legal rules have been established regarding the architect's duty to estimate the costs. Generally, architects have to draft a design that *approximately* corresponds to the client's available budget. They are not under an obligation of result. In most countries, certain percentages have been established in case law or in applicable laws and rules that provide certain margins for architects when they try to estimate the costs. So they are not allowed to exceed the cost estimation that was agreed upon with the client but there are certain margin allowed regarding this cost estimation as it would be unfeasible for architects to provide exact cost estimations.

Both architects and clients have to exchange information regarding this duty to estimate the costs. Architects, for instance, have to inquire after the client's budget financial means. Clients in return have to provide the architect with the necessary information about their budget financial means. Furthermore, architects have to inform the client if they fear that his budget financial means will be exceeded or if they can not provide accurate cost estimations for instance.

Architect Liability

Country / Duty	Netherlands	Belgium	France	Germany	England
Duty of Care	Negligence	Negligence	Negligence	Negligence	Negligence
Examination of the Building Site	Negligence	Strict	Strict	Strict	Negligence
Advise on Selection of Materials	Negligence	Negligence/ Strict	Strict	Negligence	Negligence
Advise on Applicable Law and Rules	Negligence/ Strict	Negligence/ Strict	Strict	Negligence/ Strict	Negligence/ Strict
Advise on Construction Costs	Negligence	Negligence	Negligence	Negligence	Negligence

CHAPTER 9 Authority to Act on behalf of the Client

1. Introduction

Clients can give architects the authority to perform certain activities on behalf of them. For example, clients can require architects to provide information to possible future building contractors or advisors during the allotment about the construction project. Or clients can require architects to give directions to building contractors or advisors during the realisation of the building works. Furthermore, it often occurs that architects are required to check whether or not the building works have been performed in accordance with the architect's design.

Illustration 1: A client has hired an architect under a design contract. This client not only requires the architect to deliver a design but he also requires the architect to assist him at the tender to select an appropriate building contractor who will carry out the construction of the architect's design.

As we will see in this Chapter, this obligation of architects to perform activities on behalf of the client is not always described in a similar way in the five countries that were examined. In Dutch, Belgian, and German law, for example, architects may have a mandate (*volmacht* or *Architektenvollmacht*) that gives them authority to act on behalf of the client. In French architect law, however, architects merely have to *assist* the client during the realisation of the works; an express obligation to perform activities on behalf of the client has not been established. And in England, architects are usually contracted as the client's 'agent'.

In practice, it often occurs that architects act on behalf of the client whereas they did not have the authority to do so. In that case, clients or building contractors may suffer damages, for example, because the architect has given certain directions to the building contractor that were not approved by the client. This may lead to severe liability for architects.

It also frequently occurs that architects have the client's authority to perform certain activities but exceed the limits of this authority, for instance if they provide more information to the building contractor than they were allowed to. This is often called misrepresentation and architects may be liable towards the client for his damages.

Illustration 2: A client has hired an architect under a design contract. This client not only requires the architect to deliver a design but he also requires the architect to

assist him at the tender to select an appropriate building contractor who will carry out the construction of the architect's design. Before the actual allotment starts, the architect provides misleading information to several of the applicant building contractors about the length of time the construction works will take. As a result, these building contractors submit unrealistic applications. Is the client in such situations bound to the architect's information and thus to the unrealistic applications?

In this Chapter, I will examine in what situations architects are commonly required to act on behalf of the client. I will also examine what happens if architects exceed their authority to act on behalf of the client. In particular, I will examine existing national case law for this situation.

2. The Netherlands

According to Article 7 Section 1 SR 1997, Dutch architects may be assigned by the client to advise him during the realisation of the construction project. Among these advisory activities is the architect's obligation to act on behalf of the client with regard to the realisation of the design.[475] Articles 8, 50, 51, and 52 Section 5 under a SR 1997 contain rules for specific situations.[476]

According to Article 50 SR 1997, for example, during the supervision of the works (see Chapter 10), architects may change the building specifications or charge deliveries or works other than the building specifications determine (Section 1) and take immediate measures (Section 2). Furthermore, according to Article 52 Section 5 under a, architects may represent the client during the realisation of the works, insofar the building contract does not oppose and parties have not agreed otherwise.

According to case law, architects have no authority to act on behalf of the client just because they are hired by the client as an architect.[477] Usually, the exact scope of their authority to act on behalf of the client is determined in the individual design contract.[478]

Dutch architects are often required to represent the client at the tender of the construction project. Merely, this implies that they assist the client at the accomplishment of the construction contract with the building contractor. In particular, architects advise the client on the approach to be followed for the tender and on the building applicants to invite. Furthermore, architects often prepare a draft construction contract.[479]

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475 See also Article 8 SR 1997 and Article 7 RVOI-2001.

476 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 271; Chao-Duivis, Koning, and Leijgraaf, 2004, p. 42.

477 *Gerechtshof Amsterdam* 29 March 2001, *Bouwrecht* 2003, p. 8

478 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 272.

479 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 270.

Generally, clients are bound to the information that was supplied by the architect to the building applicants that were invited for the tender. For instance, architects may give these applicants information about the price-making. This information is often registered in a so-called *nota van inlichtingen* and *proces-verbaal van aanwijzing*.[480]

However, Dutch architects have no powers regarding the actual allocation of the works to a building contractor because this is an express authority of the client. This means that architects are not authorized to sign a draft contract with the building contractor on behalf of the client. Likewise, Dutch architects are not allowed to accept the building works either. Again, this is an express obligation of the client.[481]

In situations of misrepresentation by the architect, for example when an architect acts in a way that leads to the impression that he was authorized to represent the client[482], the client may be bound towards the building contractor to the information given by the architect.[483] As a result, the client can have damages because he did not wish to be bound to this information, for instance because the architect has given directions that lead to another result than the result the client envisages. In that case, the client can claim these damages from the architect because the architect breached his duty to represent the client.[484]

However, the client's behavior may give rise to difficult liability issues. If, for instance, the architect in his relation to the client was not allowed to assign additional works to the building contractor, but the client by his silence has given the building contractor the impression that he wanted him to perform the additional works, the client is bound towards the building contractor nevertheless. The client may claim compensation from the architect because of the architect's breach of contract then.[485]

The same reasoning applies when the client allows a situation in which the architect supervises the works, whereas he is not specifically ordered to

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480 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 270.

481 Van Wijngaarden and Chao-Duivis, 2004-7, nos. 366-368; Cremers/Zonderland, 1969-1978, part B, IV no. 19; Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 270.

482 In HR 27 November 1992, *Nederlandse Jurisprudentie* 1993, 287 and HR 27 January 1984, *Nederlandse Jurisprudentie* 1984, 545. See also HR 1 March 1968, *Nederlandse Jurisprudentie* 1968, 246.

483 Articles 3:60 BW and 3:61 paragraph 2 BW; see in general Asser-Kortmann, 2004, nos. 37f; Kortmann, Faber and Strens-Meulemeester (*et al*), 1999, pp. 6-8; Van Schaik, 2004, pp. 258f; Van den Berg, 1995, p. 194; Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 272; RvA, 24 May 1968, *Bouwrecht* 1968, p. 333; *Hoge Raad* 6 May 1926, *Nederlandse Jurisprudentie* 1926, p. 721; *Hoge Raad* 18 June 1926, *Nederlandse Jurisprudentie* 1926, p. 1021.

484 See Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 271.

485 Van den Berg, Bregma,n and Chao-Duivis (*et al*), 2007, p. 271; Chao-Duivis, Koning, and Leijgraaf, 2004, pp. 40-41. See for instance *Hoge Raad* 6 May 1926, *Nederlandse Jurisprudentie* 1926, p. 721.

do so by the client. As a result, the architect may seem authorized to represent the client towards the building contractor. In that situation, the building contractor can turn to the client for the compensation of any damages and the client can take recourse against the architect.[486] This is different, however, if the client too has given the architect the idea that he was authorized to act on behalf of him.

If the architect acts on behalf of the client without the client's authority to do so, or if the architect exceeds the client's authority to represent him, he is strictly liable towards his contracting party (the building contractor in this respect).[487] According to Article 3:70 BW, the authorized architect *staat in voor* (guarantees) the mandate. This means that the architect has to compensate this party's damages that emanates from the situation that the contract has not been realised. These damages also cover the so-called *positief contractsbelang*, which is the lost profit of the contracting party now that the contract has not been accomplished.[488]

3. Belgium

Belgian architects have to be contractually assigned by the client if this client wants them to perform certain legal acts on behalf of him.[489] In a written agreement, the scope of the architect's authority needs to be specified. According to Article 10 Section 3 *Reglement van Beroepsplichten*, clients may charge the architect with activities regarding the realisation of the design by the building contractor. The architect then performs these activities on behalf of the client. For instance, clients can require architects to order construction materials, and to instruct the building contractor to carry out repair works.[490]

Strict financial issues, however, such as to pay the building contractor for his works, are the client's exclusive authority. Architects are therefore not allowed to inform the building contractor when financial issues are concerned. Furthermore, architects have no authority to accept the works of the building contractor.[491] However, they can have the client's authority to co-sign the acceptance.[492]

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486 See AIBk 27 June 1994, *Bouwrecht* 1994, p. 962.

487 Article 3:70 BW ("Wie als gevolmachtigde handelt, staat jegens de wederpartij in voor het bestaan en de omvang van de volmacht"); Asser-Kortmann, 2004, nos. 92f.

488 *Toelichting Meijers, Parlementaire Geschiedenis Boek* 3 (Explanation Meijers, Parliamentary Documents) p. 283; Asser-Kortmann, 2004, no. 97; Hijma, van Dam, van Schendel, and Valk, 2007, no. 115.

489 Baert, 2001, nos. 1201-1203; *Rechtbank Antwerpen*, 4 July 1951, *Rechtskundig Weekblad*, 1951-1952, p. 653.

490 Burssens, 2001, no. 441.

491 Burssens, 2001, no. 216.

492 Deketelaere, Schoups, and Verbeke, 2004, no. V. 194; Baert, 2001, nos. 608f, 123.

Usually, as Dutch architects, Belgian architects are charged with the practical organisation of the allocation of the building works. In that case, architects for instance have to invite building applicants to the tender, inform these applicants about the construction works, and take delivery of their registrations. Furthermore, architects often have to assist the client with the actual allocation of the works to a building contractor and with the draft construction contract.[493] As in the Netherlands, they are not allowed to actually allocate the works, however.[494]

If Belgian architects exceed the scope of their authority towards the client, any liability issues have to be settled according to Articles 1984f *Belgisch Burgerlijk Wetboek* on mandate.[495] According to these articles, clients are generally bound to the architect's performances. However, if architects exceed their authority or if they wrongfully act as if they were authorized, they are strictly liable for the damages to a third party, which is usually a building contractor.[496] In that case, the client is not held to pay the architect for the agreements he made with these third parties. This is different in two situations. Firstly, if the client has approved the agreements afterwards, he has to pay the architect for it.[497] Secondly, if the client has given this third party the impression that the architect was authorized to perform as he did (*schijnmandaat*).[498] So, as we can see, the Belgian rules on the *volmacht* of architects to act on behalf of the client do not differ very much from the Dutch rules.

4. France

Generally, as we have seen in the Netherlands, French architects merely have to assist and advise (*conseil*) the client during the building works and during the reception of the works.[499] They are only obliged to act on behalf of the client if they expressly agreed with the client in the individual design contract that they will perform representation activities on behalf of the client. In that case, the *louage d'ouvrage* comprehends a *mandat* to represent the client.[500]

Usually, if French architects have to perform activities on behalf of the client, they have to check whether the building works have been carried out

493 Burssens, 2001, no. 435

494 Baert, 2001, nos. 419-422. See also Burssens, 2001, no. 25.

495 Baert, 2001, no. 1081; Articles 1984-2011 *Belgisch Burgerlijk Wetboek*.

496 Burssens, 2001, no. 441; Article 1989 *Belgisch Burgerlijk Wetboek.*

497 See the Dutch Article 6:69 BW (*bekrachtiging*).

498 Burssens, 2001, no. 441. See the Dutch Article 3:61 paragraph 2 BW.

499 Saint-Alary and Saint-Alary-Houin, 2003, p. 144.

500 Darnet, Depuy, and Gendre, 2005, p. 95; *Cour de Cassation Civile* 3, 17 February 1999: *Juris-Classeur Périodique* 1999, IV, no. 1656. See Articles 1984-2007 *Code Civil*.

in conformity with the architect's design and cost estimation.[501] Furthermore, architects may have to inspect the building works before the reception, confirm the official report (*procès-verbal)* of the building contractor, and assist at the approval of the works and sign the minutes of completion (*le process-verbal de réception*).[502] However, as in the Netherlands and Belgium, architects are not a contracting party at the reception and therefore have no authority to sign for the reception of the works.[503]

In practice, French clients particularly hire architects to perform simple representation activities such as distributing information from clients to building contractors and vice versa. In that case, architects are liable towards the client if they do not communicate the information to the other party.[504] Less frequently it occurs that architects are also required to coordinate the realisation of the building works or to control whether these building activities actually match with the architect's design.[505] This is different from the architect's obligation under Dutch and Belgian law.

However, as in the other countries, in practice it often occurs that architects act as if they were hired by the client to act on behalf of him whereas they are not, or that architects exceed their authority to act on behalf of the client. As explained earlier, French architects are only allowed to represent the client if this authority has been explicitly agreed upon by both parties in the design contract. Architects are strictly liable towards the client if they bind him towards the building contractor by certain activities whereas they are not authorized to perform these activities.[506] For example, the architect's signature that is meant to accept the building contractor's work at the reception is not valid if the mandate in the design contract is not that far-reaching.[507]

5. Germany

German architects may have an *Architektenvollmacht* that gives them express authority to act on behalf of the client. These activities of architects need an

501 Saint-Alary and Saint-Alary-Houin, 2003, p. 144.

502 Saint-Alary and Saint-Alary-Houin, 2003, pp. 137-144; Auby and Périnet-Marquet, 1992, no. 1167; Dalloz, 1998, no. 45; Huet, 2004, p. 160.

503 Liet-Veaux and Thuillier, 1994, p. 286; Darnet, Depuy, and Gendre, 2005, p. 105.

504 Huet, 2004, p. 157.

505 Articles 1984, 1988-89 *Code Civile*. Huet, 2004, p. 156.

506 Article 1989 *Code Civil*: *Le mandataire ne peut rien faire au-delà de ce qui est porté dans son mandat: le pouvoir de transiger ne renferme pas celui de compromettre.* Article 1991 *Code Civil*: *Le mandataire est tenu d'accomplir le mandat tant qu'il en demeure chargé, et répond des dommages-intérêts qui pourraient résulter de son inexécution.*

507 Huet, 2004, p. 155.

express agreement of the client.[508] There is no clear-cut scope of this mandate; as in the other countries its existence and scope will depend on the agreements that have been made in the individual design contract.[509]

Mostly, clients require architects to prepare and assist at the allocation of the works, which mainly implies that architects are authorized to represent the client vis-à-vis the applicant building contractors.[510] In this respect, as in the Netherlands and Belgium, architects for instance have to send supplementary documents to possible tenders and keep their offers[511], draft a concept construction contract, accept the building works of the building contractor if these comply with the agreements, and inform the building contractor during the realisation of the works.[512]

Furthermore, architects may have the authority to allocate small additional assignments to the building contractor. However, according to German case law, if such assignment is not really necessary and causes considerable inclining costs for the client, the architect may have exceeded his authority and is liable towards the client.[513]

According to *Bundesgerichtshof* case law, the scope of the *Architekten-vollmacht* is rather limited. Generally, clients are well protected and architects are easily held liable on the basis of § 179 BGB. However, it was also decided that the *Architektenvollmacht* normally covers the technical acceptance of the building works by the architect, as well as the allocation of small additional assignments to specialists.[514]

Generally, German architects are not authorized to settle contractual agreements with building contractors, unless the client has explicitly agreed upon this issue with the architect in the design contract. Furthermore, architects are not authorized to instruct experts on behalf of the client.[515] Finally, as in the other countries examined, architects are not authorised to actually accept the works of the building contractor or other special experts either.[516] This is because the legal acceptance of the works is an explicit authority of the client.[517] Architects are no more than allowed to check whether or not the works are technically fit for acceptance.[518]

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508 § 164 under 1 BGB; Leineweber, 2000, no. 102; Locher, 2005, no. 495; *Oberlandesgericht Stuttgart* 13 April 1994, *Baurecht* 1994, 789.

509 Locher, 2005, no. 485; *Oberlandesgericht Brandenburg, Baurecht* 2002, 476.

510 *Bundesgerichtshof* NJ 1960, 859.

511 Locher, 2005, no. 374. See § 15 HOAI.

512 Locher, 2005, no. 412; Schmalzl, 1980, nos. 11-14; Niestrate, 2003, no. 245ff.

513 Locher, 2005, no. 496; *Oberlandesgericht Düsseldorf, Baurecht* 2000, 1198.

514 Locher, 2005, no. 498.

515 Locher, 2005, no. 495.

516 Locher, 2005, no. 493; Leineweber, 2000, no. 107; *Oberlandesgericht Düsseldorf, Baurecht* 1997, 647.

517 Löffelmann/Fleischmann, 2007, nos. 604-609; Niestrate, 2003, no. 260; Locher, 2005, no. 411; *Bundesgerichtshof* 26 April 1979, *Baurecht* 1979, 345.

518 Locher, 2005, no. 493.

So, if a German architect acts on behalf of the client without having the client's authority to do so, he is liable on the basis of § 179 BGB.[519] However, if the client knew or was considered to know of the misrepresentation, the architect is not liable.[520] This is called *Duldungsvollmacht*.[521] For example, a client who keeps silent although the building contractor has informed him on the architect's activities cannot claim damages from the architect because of this *Duldungsvollmacht*. If a client knows that the architect signs certain forms for example and does not take any action, he cannot claim damages from the architect either.[522] Besides this *Duldungsvollmacht* German law distinguishes the *Anscheinsvollmacht*, which means that the client is also liable if he did not know of the misrepresentation by the architect but if he has kept up the appearance (towards the building contractor) that the architect was allowed to represent him.[523] In that case, the client may take recourse against the architect.

6. England

Normally, as in the other countries, English architects are only authorized to act on behalf of the client if this has been contractually agreed in the design contract.[524] As so, architects have express authority conferred on them by agreement with the client. This express authority is contained in the standard form building contracts, in particular in Clause 2(2) and (3) SFA/99. According to these clauses, architects are allowed to represent the interests of the client during the course of the building works. This authority has a broad scope[525] but architects are especially required to certify payments to the building contractor, which is different from the other countries.[526]

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519 "*Wer als Vertreter einen Vertrag geschlossen hat, ist, sofern er nicht seine Vertretungsmacht nachweist, dem anderen Teil nach dessen Wahl zur Erfüllung oder zum Schadensersatz verpflichtet, wenn der Vertretene die Genehmigung des Vertrags verweigert (1). Hat der Vertreter den Mangel der Vertretungsmacht nicht gekannt, so ist er nur zum Ersatz desjenigen Schadens verpflichtet, welchen der andere Teil dadurch erleidet, dass er auf die Vertretungsmacht vertraut, jedoch nicht über den Betrag des Interesses hinaus, welches der andere Teil an der Wirksamkeit des Vertrags hat (2).*"

520 See § 179 BGB under 3: "*Der Vertreter haftet nicht, wenn der andere Teil den Mangel der Vertretungsmacht kannte oder kennen musste. Der Vertreter haftet auch dann nicht, wenn er in der Geschäftsfähigkeit beschränkt war, es sei denn, dass er mit Zustimmung seines gesetzlichen Vertreters gehandelt hat.*" See *Oberlandesgericht Düsseldorf, Baurecht* 1985, 339.

521 Schmalzl, 2006, nos. 423-424; Locher, 2005, nos. 487-488; Leineweber, 2000, no. 102; *Bundesgerichtshof, Neue Juridische Wochenschrifte* 55, 1985.

522 Locher, 2005, no. 499; *Bundesgerichtshof Schäfer-Finnern*, Z. 2.3030, 11.

523 Locher, 2005, no. 488; Leineweber, 2000, no. 102.

524 Uff, 2005, p. 222.

525 See also Uff, 2005, pp. 222, 225.

526 See James, 2002, p. 170; Wallace, 1995, nos. 6-220f; Uff, 2005, p. 279.

The architect's performances as a certifier basically come down to giving a written confirmation (by means of interim or final certificates) that the building contractor has complied with the contract specifications, which gives the building contractor right to payment.[527] According to *Sutcliffe v Thackrah*[528], architects in this respect have to exercise due care and skill as well as reach their decisions fairly, which means holding the balance between the client and the building contractor.[529] So, architects should be independent from both the client and the building contractor to perform this certification service.[530] However, it has also been established that it is the architect's primary duty to protect the client's interests, so they are not free to do what they think is fair.[531] Generally, clients have a claim for negligence against architects if they make mistakes in carrying out this certification duty.[532]

Next to this express authority of architects to act on behalf of the client, in particular cases, architects may also have an implied authority to do so from their position as architect.[533] This means that an architect has to do everything that is necessary to carry out his express duties or that an agent of his type would usually be empowered to do.[534] Under a traditional design contract (providing a design and supervising the realisation of the building works), English architects normally have implied authority to invite tenders, for instance. However, they have no implied authority to accept the building works (see the examination of the other countries in this Chapter), to vary the works, or to order additional works and thereby bind the building contractor. These activities require express authority given by the client.[535] This implied authority of architects is thus rather limited.[536]

What if English architects were not authorized to perform activities on behalf of the client and are thus in excess of their actual authority? Generally, in that case clients are not liable.[537] As in the other countries, English architects are liable towards the client for their misrepresentation,

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527 See for instance Furst and Ramsey, 2006, nos. 5-008, 5-014.

528 *Sutcliffe v Thackrah* (1974) Appeal Cases 727, p. 737.

529 See also Uff, 2005, p. 224.

530 Wallace, 1995, nos. 6-220 – 6-221; Uff, 2005, p. 279; Furst and Ramsey, 2006, no. 5-042; *Burden Ltd v Swansea Corporation* (1957), 1 Weekly Law Reports, p. 1167 at p. 1172. In *Hickman v Roberts* (1913), Appeal Cases 229, House of Lords, the architect had become so much under the client's influence that he has lost his independence and had not recovered it when he gave a final certificate. The certificate was therefore set aside in this case.

531 Wallace, 1995, no. 6-224.

532 This was decided in *Sutcliffe v Thackrah* and *Arenson v Arenson* (1977), Appeal Cases 405, House of Lords; Furst and Ramsey, 2006, no. 5-039.

533 Furst and Ramsey, 2006, no. 13-012/1; Uff, 2005, p. 223.

534 James, 2002, p. 170.

535 Furst and Ramsey, 2006, nos. 13-013 – 13-016; Uff, 2005, p. 226.

536 See James, 2002, p. 170.

537 Uff, 2005, p. 224.

which was established in the leading case *Hedley Byrne v Heller & Partners*[538]. Furthermore, according to the Misrepresentation Act 1967[539] Section 2, clients can claim damages for misrepresentation. For example, the architect is liable if his performances are not covered by what an agent in his position normally is authorised to do. However, if the client was aware of the architect's lack of authority[540], if he has ratified the architect's acts, or if he has created ostensible authority (he made the building contractor believe that the architect had authority[541]), he is liable himself towards the third party.[542] This is only different if the building contractor's belief that the agent was authorized was only derived from reliance on the agent himself.[543]

7. Summary

In this Section I will summarize the most important findings of this Chapter. To begin with English law, it is quite common for English architects to have express powers to act on behalf of the client during the course of the carrying out of the building works. Different from the other legal systems examined, English architects also have express authority to act as certifier, which means providing a written confirmation that the building contractor has complied with the contract specifications after which the building contractor is entitled to payment. In this respect, English architects have to act as impartial middlemen between the client and the building contractor. English architects may also have implied authority to represent the client but the scope of this implied authority is limited.

Dutch and Belgian law are very much alike regarding the architect's obligation to represent the client. In both countries, architects are often hired to act on behalf of the client during their design assignment. The exact scope of this authority has to be agreed upon in the individual design contract. Usually, architects in these two countries have to represent the client at the tender of the works, which basically means that they have to inform the applicants about the building works and draft a concept construction contract. However, in both countries architects are not allowed to actually allocate the works to one of the applicant building contractors. Neither are they allowed to accept the works of the building contractor. These activities are exclusively kept for the client. In case of misrepresentation of the client's interests by architects, clients may claim damages. If clients allow or (in

538 *Hedley Byrne v Heller & Partners* (1964) Appeal Cases 464, House of Lords.
539 1967 C. 7.
540 Furst and Ramsey, 2006, nos. 6-014f, 13-020.
541 Uff, 2005, p. 223.
542 See for instance *Pole v Leask* (1863) 33 Lord Justice 155; Furst and Ramsey, 2006, no. 13-019; Uff, 2005, p. 223.
543 Furst and Ramsey, 2006, no. 13-022.

Belgium) approve the architect's performances on behalf of misrepresentation they can not claim damages, however. In the situation that the client has given the third party, which is usually the building contractor, the idea that the architect was allowed to represent the client whereas he was not, the client may not be entitled to damages either.

In Germany, the scope of the architect's obligation to act on behalf of the client has to be agreed upon in the individual design contract as well. According to case law, the *Architektenvollmacht* has a limited scope. Mostly, German architects are required to prepare and assist the client at the allocation of the works. As in the Netherlands and Belgium, they are not allowed to actually accept the works as this is an explicit obligation of the client. In case of misrepresentation, German architects are liable unless the client knew and allowed the misrepresentation (*Duldungsvollmacht*) or did not know of the misrepresentation but acted as if he knew (*Anscheinsvollmacht*).

Opposite to the other four countries examined, in France it is not common that architects are under an obligation to act on behalf of the client. This is because they are merely hired to assist and advise the client instead of explicitly represent them. This obligation to assist and advise particularly implies that they have to inspect the works before the actual reception takes place. However, as in the other countries, in the individual design contract, architects and clients can agree that the architect has certain representation powers. Mostly, French architects in that case merely distribute information between the client and the building contractor during the realisation of the building works. Sometimes, they are given authority to coordinate the realisation of the works and to control whether the realisation of the works by the building contractor is in conformity with the architect's design.

Generally, in all countries, if the architect exceeds the scope of his authority or if the architect acts on behalf of the client whereas he has not been given authority by the client to do so, he is liable towards the client. If the client gives the architect certain powers to act in his name, the architect is strictly liable if he 'misrepresents' the client. The breach of their authority to perform activities on behalf of the client has the character of an obligation of result; the architect can not just do his best regarding this obligation.

(figure: page 104)

Architect Liability

Country / Duty	Netherlands	Belgium	France	Germany	England
Duty of Care	Negligence	Negligence	Negligence	Negligence	Negligence
Examination of the Building Site	Negligence	Strict	Strict	Strict	Negligence
Advise on Selection of Materials	Negligence	Negligence/ Strict	Strict	Negligence	Negligence
Advise on Applicable Law and Rules	Negligence/ Strict	Negligence/ Strict	Strict	Negligence/ Strict	Negligence/ Strict
Advise on Construction Costs	Negligence	Negligence	Negligence	Negligence	Negligence
Representa-tion	Strict	Strict	Strict	Strict	Strict

CHAPTER 10 Management and Supervision

1. Introduction

One of the most important tasks of architects within design contracts is to make sure that the building contractor performs the realisation of the building works conform the client's wishes. In order to do so, architects can be hired by the client to manage and/or supervise the building works. In most design contracts, architects and clients have explicitly agreed upon such obligation of the architect. Sometimes, architects are only required to supervise the building works of the building contractor (supervision).

Illustration 1: *A client commissioned an architect to supervise the building works. One of the most important phases is to pour concrete. It is standard procedure that the architect checks on the reinforcement of the building work before the concrete is poured. However, the architect failed to check the reinforcing materials. After the acceptance of the works the floor shows cracks. The client held the architect liable, because he did not duly perform his duty to supervise the building works.*

In other cases, however, architects are also required to manage these building works and to give directions to the building contractor. I will call this management.

Illustration 2: A building contractor is hired to build a swimming pool. As this building contractor is not experienced with building swimming pools, the architect who is experienced with this work is hired by the client to manage the works. However, the architect neglects to give the building contractor instructions. As a result, the building contractor fails to build a suitable swimming pool; the pool leaks through. The architect is held liable for the damage because he had sufficient expertise and it was to be expected that the architect had shared his knowledge with the building contractor, for instance by giving the building contractor technical specifications.[544]

Often, in the countries that were examined for this study, the notions management and supervision were applied confusedly. Therefore, in this Chapter, I will first examine what these two notions stand for in each country. Furthermore, as in case of non-performance of this obligation difficult liability issues rise, I will examine to what specific obligations architects are held under this duty.

[544] RvA 28 April 1994, *Bouwrecht* 1994/874, no. 15.936.

2. The Netherlands

According to Article 52 paragraph 5 SR 1997, architects have to *supervise* the realisation of the building works by the building contractor. In particular, they have to supervise that the works are performed conform the requirements that were agreed upon in the building contract. For example, they have to see that the building works are in conformity with the architect's design.

Furthermore, architects have to determine whether the works are fit for approval. For example, they have to check whether the building contractor has observed the agreed time limits and building specifications.[545] According to case law, architects sometimes also have to check whether the building contractor supplies what he claims to supply.[546] In this respect, commonly, architects are required to make sure that the building contractor supplies the client with the certificates needed.[547]

Generally, architects are expected to regularly visit the works and check the progress and quality of the works.[548] According to case law based on Article 51 SR 1997, the required supervision depends on the nature and size of the building works.[549] Contracting parties can contractually agree on daily or permanent supervision if such is required regarding the importance of the building works for instance. In that case, architects often hire one or more inspector(s) to assist them.[550]

Architects can also be assigned to *manage* the works. This is called *directievoering*. This obligation is sometimes covered in a separate contract, the management agreement, but can also be covered by the design contract. In Article 52 paragraph 5 under a SR 1997[551], management has been

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545 Van Wijngaarden and Chao-Duivis, 2004-7, no. 371. According to AIBk 16 August 2000, *Bouwrecht* 2001, p. 253, architects normally see to it that the building contractor supplies the client with the certificates needed. Following RvA 29 March 1989, *Bouwrecht* 1989, p. 851, the architect's supervision of the works consists of checking whether the building contractor supplies what he claims to supply. Moreover, in AIBk 4 September 1989, *Bouwrecht* 1990, p. 482, it was decided that architects generally may be expected to regularly visit the works and to check the progress and quality of these works.

546 RvA 29 March 1989, *Bouwrecht* 1989, p. 851.

547 AIBk 16 August 2000, *Bouwrecht* 2001, p. 253.

548 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 271; Van Wijngaarden and Chao-Duivis, 2004-9, no. 503. AIBk 4 September 1989, *Bouwrecht* 1990, p. 482

549 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 276. In RvA 26 July 1990, *Bouwrecht* 1990, p. 937, the design contract provided that the architect was to supervise the works for at least two hours a week. The architect fulfilled this agreement, but the building contractor failed in the realisation of the design. AIBk 8 May 2001, *Bouwrecht* 2002, p. 640.

550 See also Article 51 SR 1997 and Article 5 DNR 2005; Van Wijngaarden and Chao-Duivis, 2004-7, nos. 393f.

551 See also RVOI-2001, Article 26 paragraph 1 under 1.7. In the DNR 2005, a specific provision on this management lacks.

described as representing the client in all affairs regarding the realisation of the works, insofar as the building contract does not oppose and parties have not agreed differently (in the individual design contract or management agreement).

This means that, if they are hired to manage the works, architects are in charge of the building activities and have to instruct the building contractor if necessary. For example, they have to intervene if the building contractor is off the track or if the realisation of the works does not succeed because problems occur that were not foreseen in the building specifications.[552]

Management of the works implies that architects have certain power to represent the client.[553] The duty of architects to represent the client has been discussed in Chapter 9 of this study. According to Article 8 SR 1997, architects act as the client's representative, unless contracting parties have agreed differently. In Article 50 SR 1997, the architect's authority as being the client's representative has been established. See Chapter 9 for exceeding the authority to represent the client.

Analysis of case law on supervision and management of the building works by architects shows that architects are under an obligation of means and are therefore liable for negligence in case of non-performance. For instance, an architect who was hired to supervise the building works (not daily) and whose inspector regularly visited the building, was not held liable for not having discovered a leakage in a cable.[554] In another case, an architect who had not sufficiently supervised and managed the carrying out of the roofing by the building contractor was held liable for the damage towards the client.[555]

Finally, an architect who was hired to perform occasionally supervision was not considered to notice or should have noticed the building contractor's irregularities.[556] In a 1993 case[557], the architect was held liable for the negligent performance of his duty to manage the building works as he failed to intervene when the ceiling was lathed, whereas the client asked him to. In this case, the building contractor had not succeeded in properly lathing the ceiling, which caused shrinkage of the laths.

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552 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 271.

553 Van den Berg, 2007, p. 271; Van den Berg, 1995, no. 3, pp. 193-200. Van Wijngaarden and Chao-Duivis, 2004-7, nos. 381 and 388. RvA 13 July 1982, no. 10154, 1981-1982, p. 184; RvA 14 November 1988, *Bouwrecht* 1990 p. 767; AIBk 31 August 1992, *Bouwrecht* 1994 p. 443.

554 RvA 18 February 1994, *Bouwrecht* 1994, p. 972.

555 AIBk 25 October 1989, *Bouwrecht* 1990 p. 561.

556 AIBIk 21 December 1998, *Bouwrecht* 2000, p. 79.

557 RvA 3 November 1993, *Bouwrecht* 1994, p. 969.

3. Belgium

According to Article 4 *Architectenwet*, architects are required to provide a design and to perform the *controle op de uitvoering van de werken* (in the situation that a building license is required[558]). In addition, in Article 21 *Reglement van Beroepsplichten* has been established that architects, who are assigned to perform a final design *(uitvoeringsontwerp)*, are obliged to manage the building works.[559]

This means that clients are not only obliged to hire an architect for their design activities but also for the management of the building activities.[560] However, clients can hire different architects to provide a design and perform management activities.[561] Other aspects of the construction project such as the tender or the coordination of the different construction works can be performed by the client himself or assigned to third parties.[562]

Baert and Van Houtte, among others, argue that the notions *toezicht* (supervison) and *controle op de uitvoering van de werken* (management of the building works) are being applied confusedly because these notions are used as synonyms in applicable legislation.[563] Article 13 *Deontologische norm* no. 2, for instance, establishes that *toezicht* consists of the general direction of the works, which does not include permanent supervision regarding the application of building materials as this is the building contractor's responsibility. It covers the required instructions to building contractors about the coordination and realisation of the works. *Toezicht* contains different activities as are required regarding the nature and scope of the works.

In an attempt to clarify this legislation, Beeck and Hannequart have described *toezicht* as the architect's permanent presence at the building site, and *controle* as the architect's occasional presence at the building site where he checks on what is verifiable at that moment.[564] In addition, according to Hannequart controle implies that the architect is present at the building site with a frequency that is satisfactory to discover any shortcomings in time in order to assure the time limits of the building contractor. Furthermore, the

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558 Burssens, 2001, no. 27. If a building license is *not* required for the building works, clients are not legally obliged to hire an architect to manage the building works.

559 Only if these architects are certain that another architect is taking care of the management, they are not under such an obligation. Burssens, 2001, no. 51; Baert, 2001, no. 433; Van Houtte, 1988, pp. 401-402.

560 Van Houtte, 1988, pp. 401-402; *Hof van Cassatie*, 27 October 2006, no. D. 06/0001.N; *Hof van Cassatie*, 27 April 2007, D.06/0010.N/1.

561 Burssens, 2001, no. 26; Baert, 2001, no. 433.

562 Burssens, 2001, nos. 25, 33; Baert, 2001, no. 593.

563 Baert, 2001, no. 1558; Van Houtte, 1988, pp. 405f.

564 Beeck, 1987, p. 52.

architect should also visit the building site if he has indications that his intervention might be needed to prevent damages to the works.[565]

Deketelaere, Schoups, and Verbeke on the other hand, clearly distinguish between *leiding van de werken, controle van de werken* and *toezicht*.[566] Accordingly, *leiding van de werken* implies that architects give instructions to building contractors for a proper realisation of the building works. These instructions need to be clear, precise, complete, and timely.[567] Van Houtte prefers to see the architect's obligation in this respect as a duty to inform the client and the building contractor about the correct interpretation of the design.[568]

What is meant by *controle van de werken* does not clearly follow from the law. According to Deketelaere, Schoups, and Verbeke *controle van de werken* means that architects have to verify whether the building works comply with the design, building specifications, the rules of art, and the time limits that were settled. Beeck describes *controle van de werken* as the irregular presence of a person at a site where he checks on what can be checked at that time (*wat op het ogenblik controleerbaar is*).[569] According to Hannequart, *controle* aims at protecting the client by assuring that the construction project can be realised within the agreed period of time. This means that the *controle* concentrates on the final completion of the works more than the realisation of the works by the building contractor.[570]

The supervision and management activities of architects involve different activities for each individual design assignment.[571] For instance, the importance of the works (such as foundations), the difficulty of certain building works, the altitude of the building works, and the specialist professional skills of the building contractor may require more intensive activities of architects.[572]

Basically, as in the Netherlands, Belgian architects are not obliged to be permanently present at the building site.[573] They have to regularly visit the building site[574] and, when necessary, organise chair meetings together with the building contractors. Furthermore, they may be required to check the

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565 Hannequart and Clesse, 1985, no. 75.

566 Deketelaere, Schoups, and Verbeke, 2004, nos. V. 184f.

567 Deketelaere, Schoups, and Verbeke, 2004, no. V. 184.

568 Van Houtte, 1988, p. 407.

569 Beeck, 1987, p. 52.

570 Hannequart and Clesse, 1985, no. 75.

571 Baert, 2001, no. 1558.

572 Baert, 2001, no. 1559.

573 Van Houtte, 1988, p. 406; *Hof van Beroep Antwerpen*, 14 October 2003, *Rechtskundig Weekblad* 2005-2006 (22), p. 863; *Rechtbank van Antwerpen*, 3 June 2004, *Rechtskundig Weekblad* 2007-2008 (71), p. 1416; *Rechtbank van Antwerpen*, 8 April 2004, *Rechtskundig Weekblad* 2005-2006 (69), p. 714.

574 *Hof van Cassatie*, 27 October 2006, no. D. 06/0001.N.

building materials and see whether these are conform to the building specifications and do not bear any deficiencies.[575] According to case law, these regular visits of the architect may imply that, even if the building contractor's shortcomings where hardly visible, the architect has to stop the works and notify the client of the shortcomings.[576]

At certain significant moments during the realisation of the building works, such as the foundation of the building or when the building's altitude is being constructed[577], Belgian architects have to intensify their supervision and be present at the building site.[578] They also need to be present if the building contractor carries out the building works with considerable carelessness or if works are being carried out that will soon be covered by concrete and thus become invisible.[579] Architects who are not considered to be present at the construction site permanently, have to point out certain dangerous or delicate moments to the building contractor.[580] According to case law, excavation works or ditching works (*sleufwerk*) were not considered such significant moments at which architects have to be present at the building site.[581]

Sometimes, architects are required to coordinate the works of different building contractors as well.[582] As in the Netherlands, architects are allowed to hire specialist engineers to assist them during their obligation to control the building works.[583] Architects are not obliged to control specialized works that were assigned to specialized building contractors.[584]

So, Belgian architects do not have to be present at the building site permanently.[585] Therefore, they are not under an obligation of result but under an obligation of means.[586] After all, as architects are not permanently

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575 Baert, 2001, no. 1611. Permanent supervision of the use of building materials by building contractors for the realisation of the design is not required because building contractors are fully responsible according to Article 13 *Deontologische norm* no. 2.

576 *Rechtbank Antwerpen*, 8 April 2004, *Rechtskundig Weekblad*, 2005-2006, no. 18, 2005, p. 714.

577 Baert, 2001, no. 1540.

578 Deketelaere, Schoups, and Verbeke, 2004, no. V. 185; Baert, 2001, no. 1277; Luik, 3 February 1986, *Jurisprudence Liège*, 1986, p. 637.

579 Brussel, 21 September 1979, *Journal Tribuneaux* 1981, p. 28.

580 Baert, 2001, no. 1277.

581 Brussels, 23 January 1975, *Tijdschrift voor Aannemingsrecht*, 1975, 146.

582 Baert, 2001, nos. 604-607; Deketelaere, Schoups, and Verbeke, 2004, no. V. 187; Van Houtte, 1988, p. 407.

583 Baert, 2001, nos. 509-510, 1199.

584 Deketelaere, Schoups, and Verbeke, 2004, no. XI. 28.

585 *Liège*, 4 April 1996, *La Revue de Jursiprudence de Liège, Mons et Bruxelles*, 1999, p. 5; *Hof van Beroep Antwerpen*, 14 October 2003, *Rechtskundig Weekblad* 2005-2006 (22), 2006, p. 863.

586 *Hof van Beroep Antwerpen*, 14 October 2003, *Rechtskundig Weekblad* 2005-2006 (22), 2006, p. 863; *Rechtbank van Antwerpen*, 3 June 2004, *Rechtskundig Weekblad* 2007-2008 (71), p. 1416; *Rechtbank van Antwerpen*, 8 April 2004, *Rechtskundig Weekblad* 2005-2006 (69), p. 714.

present, they can not guarantee a perfect realisation of the building works.[587] They can not be expected to notice all failures and shortcomings. The client will thus have to bear a risk of damages himself.[588]

If Belgian architects do not duly perform their duty to manage or control the building works, they can be liable for damages during the realisation of the design. In that case, the architect's performance has to be compared to what a normally careful and foreseeing architect would have done if similar circumstances applied.[589] There is no presumption of fault that applies to the architect's non-performance in this respect. Architects are under an obligation of means. However, the circumstances of the individual case may require that architects are present at the building site to see to it that the result envisaged by the client is achieved.[590]

According to case law, however, architects may not too easily think that they have duly performed their assignment to manage the building works. For example, an architect who was assigned to manage the building works regarding the instalment of a fireplace had to see to it that the fireplace was connected to the right chimneystack. He was held liable for the damages.[591]

4. France

Direction de travaux or *direction de l'exécution des travaux* (management of the works) and *surveillance* (supervision) are clearly separated in French architect law.[592] Usually, French architects are under an obligation to manage the realisation of the works by the building contractor.[593] Accordingly, they have to make sure that the building works are realised conform the design, which is similar to the other legal systems examined.[594]

In this respect, architects are required to give directions to the building contractor and have to see to it that these directions are actually followed.[595] Architects also have to check the progress of the works and inform the building contractor, for instance about the soil conditions or about any

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587 Deketelaere, Schoups, and Verbeke, 2004, no. V. 186; Baert, 2001, no. 598; Van Houtte, 1988, p. 412; Brussels, 25 June 1986, *Res et Jura Immobilia* 1988, p. 5.

588 Baert, 2001, no. 1557; Beeck, 1987 p. 57; *Liège* 4 April 1996, *La Revue de Jursiprudence de Liège, Mons et Bruxelles* 1996, p. 5; Baert, 2001, nos. 1557-1565.

589 Deketelaere, Schoups, and Verbeke, 2004, no. XI. 28; Baert, 2001, nos. 1255-1256, 1277.

590 Baert, 2001, no. 1540.

591 *Hof van Cassatie*, 6 June 1985, *Arresten van het Hof van Cassatie* 1984-1985, 1378; Baert, 2001, no. 1565.

592 Dalloz, 1998, p. 14; Saint-Alary and Saint-Alary-Houin, 2003, p. 143.

593 Huet, 2004, p. 158.

594 Huet, 2004, p. 158; Darnet, Depuy, and Gendre, no. 287.

595 Saint-Alary and Saint-Alary-Houin, 2003, p. 143; Darnet, Depuy, and Gendre, 2005, no. 287; Liet-Veaux and Thuillier, 1994, p. 284; Dalloz, 1998, no. 43; *Cour de Cassation Civile* 3, 9 May 1972, *Actualité Juridique de Propriété Immobilière*, 1973-II, p. 226.

special risks that are involved with the realisation of the building works.[596] Besides informing the building contractor, architects have to inform the client about any delays in the realisation of the works.[597] Furthermore, architects may be required to coordinate the works when different building contractors are performing the realisation of the design.[598] Finally, they have to draw necessary reports of the progress of the building works.[599]

If architects are obliged to merely supervise the building works (*surveillance*), their assignment seems stricter than if they are obliged to manage the works.[600] This *surveillance* has been described in literature as *contrôler l'exécution des travaux* (supervise the realisation of the works).[601] *Direction de travaux* does not cover this *surveillance*.[602]

Although it would be better if the scope of this supervision were detailed described in the design contract, often only general phrases have been established.[603] Normally, architects are obliged to frequently visit the building site. As in the other countries examined, permanent presence at the building site is not required.[604] According to case law, architects are required to be attentive when supervising the works.[605]

So, periodic supervision is sufficient. The exact scope of this supervision, however, should be determined in the design contract. Often, architects weekly visit the building site. In addition, they pay irregular visits, for example in case of important building works such as the foundation of the works or if new, riskful materials are applied.[606] As in the other countries, the nature of the works, small-scale or large-scale for example, is important to determine the scope of the architect's activities. Furthermore, in case of

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596 Auby and Périnet-Marquet, 1992, no. 1167.

597 Darnet, Depuy, and Gendre, 2005, no. 287; Auby and Périnet-Marquet, 1992, no. 1167; *Paris* 2 December 1959, *Gazette du Palais* 1959, 348; *Cour de Cassation Civile* 3, 30 October 1969, *Bulletin Civile* III, p. 522; *Cour de Cassation Civile* 3, 6 December 1983, *Revue trimestrielle de droit immobilière* 1984, p. 188.

598 Saint-Alary and Saint-Alary-Houin, 2003, p. 143.

599 Auby and Périnet-Marquet, 1992, no. 1167.

600 Saint-Alary and Saint-Alary-Houin, 2003, p. 143; Auby, 1992, no. 1167.

601 Saint-Alary and Saint-Alary-Houin, 2003, p. 143.

602 Darnet, Depuy, and Gendre, nos. 180, 288; *Cour de Cassation Civile* 3, 4 July 1973: *Bulletin civile* 1073, III, no. 463.

603 Huet, 2004, p. 158.

604 Huet, 2004, p. 158.

605 Saint-Alary and Saint-Alary-Houin, 2003, p. 143; Darnet, Depuy, and Gendre, 2005, p. 288; Liet-Veaux and Thuillier, 1994, p. 285; Auby and Périnet-Marquet, 1992, no. 1167; *Cour de Cassation Civile* 3, 25 May 1976, *Bulletin Civile* III, p. 170; *Cour de Cassation Civile* 3, 19 June 1984, *Revue trimestrielle de droit immobilière*, 1985, p. 61.

606 Auby and Périnet-Marquet, 1992, no. 1167; Liet-Veaux et Thuillier, 1994, p. 285; Darnet, Depuy, and Gendre, 2005, no. 288; *Cour de Cassation Civile* 3, 18 March 1981, *Juridique Notariale et Immobilière*, 1981, p. 200; *Cour de Cassation 3e civile*, 14 March 1984: *Juris-Classeur Périodique* 1984, IV, 162. *Cour de Cassation Civile* 3, 4 July 1973: *Bulletin civile* 1973, III, no. 463.

renewal works often more management is required than in case of new housing development.

There is much discussion whether architects are under an obligation of means or result towards the client regarding their duty to supervise or manage the building works. According to literature and case law, architects are under a clear obligation of means regarding their managing activities.[607] Regarding the duty to supervise, however, some authors uphold an obligation of result but others say that this *surveillance* is just an obligation of means because architects are not to be seen as *surveillants de chantier* and supervising the works can not entail fitness for purpose liability.[608] Taking into regard Article 1792f *Code Civil*, it seems however that French architects are under an obligation of result as was observed with the other obligations of French architects. After all, as has been explained in Chapter 4, French architects are strictly liable if Article 1792f *Code Civil* is at stake. Therefore, I will regard the obligation to supervise the building works as an obligation of result.

5. Germany

In Germany, the architect's duty to supervise the realisation of the design is called *Bauaufsichtspflicht*, *Objektüberwachung*, or *Bauüberwachung*.[609] It consists of three important obligations; to notify any defaults in the realisation of the works, to notify any failures in the coordination of the works, and to notify any failures regarding the construction costs (*wirtschaftlichen betreuung*).[610] To start with the latter, architects for instance have to keep up a journal on the building activities, they have to check whether the client's budget financial means is not exceeded by the building activities, and they have to provide an outline of the total construction costs.[611]

Regarding the obligation to notify any failures in the coordination of the works, the architect's duty to advise the client is important as well. As we have seen in Chapter 3 of this study, generally German architects are in a *Sachwalter*-position towards the client. This duty was established both in case law and literature.[612] Being the client's *Sachwalter*, German architects are responsible for the *reibungslosen Ablauf des Baugeschehens* (smooth course of

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607 Saint-Alary and Saint-Alary-Houin, 2003, p. 143; Auby, no. 1167; *Cour de Cassation Civile* 3, 31 May 1989, *Juris-Classeur Périodique* 1989, IV 283.

608 Saint-Alary and Saint-Alary-Houin, 2003, p. 143.

609 Niestrate, 2003, no. 105ff; Locher, 2005, no. 406; § 15 under 2 and 8 HOAI; Schmalzl, 1980, no. 50.

610 Niestrate, 2003, no. 105.

611 Niestrate, 2003, nos. 40-54.

612 *Bundesgerichtshof* 1978, *Baurecht*, 1978, 235; Niestrate, 2003, no. 245.

the building activities). So they have to coordinate and harmonise the works of the designing and constructing contracting parties.[613]

This *Koordinierungspflicht* sometimes starts during the design activity if the client has hired *Sonderfachleute*.[614] Architects have to make sure that the performances of these *Sonderfachleute* comply with the client's wishes and are not defective. Furthermore, architects have to agree on certain terms of completion that these *Sonderfachleute* have to comply with.[615]

The most important supervisory obligation of German architects is the duty to notify the client for any defaults in the realisation of the works (often called *Bau-* or *Objektüberwachung*). The works may be supervised by the architect who has actually drafted the design (*planende Architekt)*, or by an *ortliche Bauleiter* or *bauleitende Architekt* (local managing architect).[616] The scope of this obligation depends on what was agreed in the individual design contract. Basically, architects are under the obligation to see to it that the building works are realised according to the *Baugenehmigung, Leistungsbeschreibungen und allgemein anerkannten Regeln der Technik und Vorschriften* (building license, description of the performance to be carried out and publicly known technical rules and regulations.).[617]

As explained in Sections 2 to 4, in case law often disputes rise on how much supervision is required for the architect to comply with this obligation towards the client. In case of routine jobs performed by the building contractor, for example, architects are not required to perform intense supervision.[618] According to the *Bundesgerichtshof*, in order to make sure that the realisation of the works is according to the design and without any failures, German architects are not obliged to be constantly present at the site. They have to frequently visit the building site in order to be able to give instructions to the building contractor and to make sure that the building contractor observes these instructions.[619] This seems to indicate an obligation of means, comparable to Dutch and Belgian law.[620]

This obligation to give instructions to the building contractor during the realisation of the works implies that architects are allowed to order certain

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613 HOAI, § 15, Leistungsphase 8; *Landgericht Aachen* 16 January 1985, *Baurecht* 1986, 604; Niestrate, 2003, nos. 80-81; Löffelmann/Fleischmann, 2007, nos. 497f.

614 Niestrate, 2003, no. 82.

615 Niestrate, 2003, no. 84.

616 Löffelmann/Fleischmann, 2007, nos. 497f; Locher, 2005, nos. 418f. As a result, local managing architects and the actual designers may be jointly responsible in case of damages towards the client.

617 Niestrate, 2003, no. 107; Löffelmann/Fleischmann, 2007, nos. 497f; Busch, 2007, p. 320; Locher, 2005, no. 406; *Bundesgerichtshof Baurecht* 1971, 131; *Oberlandesgericht Düsseldorf*, 30 March 2004, *Baurecht* 2004, 1331ff.

618 Leineweber, 2000, nos. 564-565; *Bundesgerichtshof*, *Versicherungsrecht* 69, 473.

619 *Bundesgerichtshof*, 10 February 1994, *Baurecht* 1994, 392; Niestrate, 2003, no. 108; Löffelmann/Fleischmann, 2007, nos. 497f.

620 See also Busch, 2007, p. 299.

activities in case of deficiencies.[621] This is also called *Objektbetreuung*, which literally means 'taking care for the object'. Although in German law a strict distinction between supervision and management does not exist, *Objektüberwachung* seems to imply supervision, whereas *Objektbetreuung* implies management. The *Objektbetreuung* of German architects has been established in *Leistungsphase* 9, § 15 HOAI.[622] In this respect, German architects are obliged to examine whether the final works (the building) is free from any shortcomings as a result of the building contractor's realisation of the design. Again, architects have to take into account the *anerkannten Regeln der Technik*.[623]

As in the other countries, at critical moments during the realisation of the design, more intensified supervision is often required.[624] For example, in case of the construction of concrete floors, insulation against groundwater and handicraft roofing works.[625] Furthermore, intensive supervision is required if the client himself performs certain activities to realise the design, in case the building contractor hires acquaintances to assist him with the building works, or if the architect does not have faith in the building contractor's realisation of the works.[626] And if the original design is being modified during the building works, such as if the walls of the construction need to be heightened, or if the architects chooses to apply an unusual construction, more frequent supervision of the architect is required too.[627]

Despite all this, German architects are not obliged to supervise the realisation of the works if the building contractor hires a specialist and the architect does not have, and is not expected to have either, the expertise required.[628] This also applies if *Sonderfachleute* are being hired for certain parts of the building works. In practice, architects often recommend the client to hire such *Sonderfachleute* as they are not sufficiently qualified themselves.[629] However, an architect is still liable if he could have observed failures of the building contractor taking in regard the architect's

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621 Schmalzl, 1980, no. 423.

622 Locher, 2005, no. 372; Löffelmann/Fleischmann, 2007, nos. 748f.

623 Busch, 2007, pp. 320-321.

624 Locher, 2005, no. 406.

625 Löffelmann/Fleischmann, 2007, nos. 518f; Leineweber, 2000, nos. 566-567.

626 *Oberlandsegericht Hamm*, *Oberlandesgericht* 1996, 206; Niestrate, 2003, no. 116; Löffelmann/Fleischmann, 2007, nos. 497f; Werner/Pastor, 2008, no. 1862; Leineweber, 2000, no. 565; *Bundesgerichtshof, Baurecht* 1986, 112; *Oberlandesgericht Hamm*, 23 November 2004, *Baurecht* 2005, 897f; see also *Oberlandesgericht Naumburg*, 13 May 2005, Baurecht 2006, 554f, where it was argued that the architect shoud have intensified his supervision of the building works as the building contractor *den Untergrund fur Pflasterarbeiten selbst plant*.

627 *Oberlandesgericht Hamm*, 7 April 192, *Baurecht* 1993, 730; *Oberlandesgericht Hamm* 6 May 1997, *Baurecht* 1997, 880.

628 Niestrate, 2003, no. 117; Löffelmann/Fleischmann, 2007, nos. 522-523, 534f; *Bundesgerichtshof Baurecht* 1976, 68; *Bundesgerichtshof, Baurecht* 2000, 1217.

629 Niestrate, 2003, no. 118.

professional skill. Therefore, architects may not completely rely on this expert's skills.[630]

6. England

Whereas in other countries (for instance Belgium and France) a clear distinction between supervision and management exists, in England the supervisory and managing obligations of architects are covered by the notion supervision.[631] However, it is considered one of the basic duties of architects to supervise that the realisation of the works are being performed according to the requirements of the building contract and according to the desired result.[632] According to *Sutcliffe v Chippendale & Edmondson*[633], "In particular the building owner is entitled to expect his architect so to administer the contract and supervise the work, as to ensure, as far as is reasonably possible, that the quality of the works matches up to the standard contemplated."

So, architects have to perform 'reasonable' supervision and check substantial and important matters, such as the bottoming of a cement floor, for any defects in this work will be covered after the works have been finished and are therefore hard to discover.[634] More specific requirements must be arranged for in the individual design contract.

In any case, as in the other countries examined, architects are not required to be present at the building site continuously.[635] Following the RIBA standard conditions, periodic and no constant supervision is required. According to Clause 2.8, architects have to make such visits to the building works as are reasonably expected to be necessary at the date of the appointment.[636] Basically, their supervision must be sufficient to see that the building work has been carried out as the building contract requires. In *James v Simon*[637], it has been established that the frequency of inspections must be sufficient to check important items, especially those which will be covered up by later work. And according to *Sutcliffe v Chippendale &*

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630 Niestrate, 2003, nos. 116-119; *Oberlandesgericht Koblenz*, 17 December 1996, *Baurecht* 1997, 502; Schmalzl, 1980, no. 51.

631 See for example, Furst and Ramsey, 2006, no. 13-043.

632 James, 2002, p. 160; Uff, 2005, p. 292; Furst and Ramsey, 2006, nos. 13-015, 13-043. See also SFA/99 under nos. 3.1.1-4.1.4.

633 *Sutcliffe v Chippendale & Edmondson* (1971), 18 Building Law Reports, p. 149 at p. 162.

634 Furst and Ramsey, 2006, no. 13-043; Uff, 2005, p. 292.

635 Furst and Ramsey, 2006, no. 13-043.

636 Under previous RIBA forms, architects were required to visit the works at intervals appropriate to the stage of the construction. There is now no such express term included in the RIBA forms. See Furst and Ramsey, 2006, no. 13-044.

637 *James v Simon* (1899) 1 *F.* 1211.

Edmondson[638], "(…) the architect is not permanently on the site but appears at intervals, it may be of a week or a fortnight (…)."

Usually, clients and architects contractually agree on the level of supervision, which depends on the specific requirements of the works.[639] According to *Corfield v Grant*[640], the proof of the pudding is in the eating. Only in the end it can be determined whether the level of supervision was enough for the particular job. Generally, architects are not obliged to be permanently present at the site; weekly visits of the building site will suffice.[641] Architects are allowed to make use of assistants, often being quantity surveyors[642], but this does not free them of their duty to observe reasonable care and skill.[643]

If architects have not discovered a defect that a reasonable examination should have made apparent, they may be liable.[644] English architects are under an obligation of means regarding their obligation to supervise the works. According to *Jackson v Powell*[645], architects are to exercise reasonable skill and care in seeking to achieve a particular result. They do not have to guarantee that a particular result will be achieved or that their inspection will reveal or prevent all defective work.[646] In *East Ham v Bernard Sunley*[647], this reasonable examination has been discussed: "In failing to discover a defect, which a reasonable examination would have disclosed, in fact the architect was necessarily thereby in breach of his duty to the building owner so as to be liable in an action for negligence".[648]

7. Summary

As noted in the introduction to this Chapter, it is difficult to clearly differentiate between the architect's obligation to supervise and to manage the building works of the building contractor. Especially in the Netherlands and Germany these two obligations often merge. Moreover, in England the

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638 *Sutcliffe v Chippendale & Edmondson* (1971), 18 Building Law Reports, p. 149 at p. 162.

639 James, 2002, p. 160; Uff, 2005, pp. 292-293.

640 *Corfield v Grant* (1992) 29 Construction Law Reports 58.

641 Furst and Ramsey, 2006, no. 13-043.

642 These quantity surveyors are commonly hired in construction practices. Their ordinary duties include taking out in detail the measurements and quantities from plans prepared by an architect, for the purpose of enabling builders to calculate the amounts for which they would execute the plans. See Furst and Ramsey, 2006, no. 13-090; Uff, 2005, pp. 295, 132; *Taylor v Hall* (1870) *I.R.* 4 *C.L.,* p. 467 at p. 476.

643 Wallace, 1995, nos. 2.184 and 2.185.

644 Furst and Ramsey, 2006, no. 13-043.

645 See also Furst and Ramsey, 2006, no. 13-043.

646 James, 2002, p. 160; Furst and Ramsey, 2006, no. 13-043. See also *Corfield v Grant* (1992), 59 Building Law Reports, p. 102 at p. 119.

647 *East Ham v. Bernard Sunley* (1988), 42 Building Law Reports 1.

648 Uff, 2005, p. 292.

managing and supervising duties of architects are covered by one notion; supervision. For the most part, architects are held to perform both supervisory and managing obligations. However, sometimes architects are hired merely to perform a certain degree of supervision at the building activities.

Regarding their duty to supervise the building works, architects have rather similar obligations in the countries that were examined. Generally, architects have to check whether the building activities are being performed conform the design, the building specifications and the time limits that were agreed. The exact scope of the architect's supervision is determined by the nature and size of the works. Basically, they are not obliged to perform permanent supervision. Regular supervision is considered sufficient. In addition, in each country, architects have to be present at the building site at certain delicate or riskful stages during the building activities. Frequently given examples in case law are the foundation of the works and if new or riskful materials are being applied to the building. In all countries, architects are allowed to hire an inspector to assist him in this respect.

When architects are also hired to manage the building works, their most important obligation is to give the building contractor instructions during the construction. This obligation is closely linked to the architect's duty to represent the client, which was examined in Chapter 9. After all, architects who have to give instructions to the building contractor often represent the client in this respect. Overall, architects are under an obligation of means when they supervise or manage the building works. This has been established in national case law in particular.

In France, however, there is much discussion whether architects are under an obligation of means or result towards the client regarding their duty to supervise or manage the building works. According to Article 1792f *Code Civil*, French architects are strictly liable but according to literature and case law, architects are under a clear obligation of means regarding their *managing* activities. Regarding the duty to supervise, some authors uphold an obligation of result but others say that this *surveillance* is just an obligation of means because architects are not to be seen as *surveillants de chantier* and supervising the works can not entail fitness for purpose liability.

In French literature and case law too negligence liability has been supported if the architect fails in performing these duties. However, given the liability system that has been established in Article 1792f *Code Civil* French architects seem under strict liability if they do not duly perform their duties. Therefore, I will consider their duty to supervise and manage the building works as an obligation of result instead of an obligation of means that was observed in the other countries.

(figure: page 119)

Architect Liability

Country / Duty	Netherlands	Belgium	France	Germany	England
Duty of Care	Negligence	Negligence	Negligence	Negligence	Negligence
Examination of the Building Site	Negligence	Strict	Strict	Strict	Negligence
Advise on Selection of Materials	Negligence	Negligence/ Strict	Strict	Negligence	Negligence
Advise on Applicable Law and Rules	Negligence/ Strict	Negligence/ Strict	Strict	Negligence/ Strict	Negligence/ Strict
Advise on Construction Costs	Negligence	Negligence	Negligence	Negligence	Negligence
Representa-tion	Strict	Strict	Strict	Strict	Strict
Management and Supervision	Negligence	Negligence	Strict	Negligence	Negligence

CHAPTER 11 Limitation Architect Liability

1. Introduction

In Chapters 5 to 10, I have examined seven obligations that Dutch, Belgian, French, German, and English architects often have to perform under the design contract. Sometimes, architects are under an obligation of means regarding these obligations and sometimes architects are under an obligation of result.[649] As we have seen in the previous Chapters, architects usually face negligence liability in case they do not duly perform these design duties (see the schematic overview on page 123). In particular Dutch and English architects are under an overall obligation of means regarding their design duties. Belgian and German architects, however, are strictly liable for some of their obligations. And French architects are predominantly under an obligation of result when they perform their obligations towards the client under the design contract.

If architects have not (duly) performed one of their obligations under the design contract, they may cause damage to their clients. Clients may claim compensation from these architects to cover these damages. Usually, architects respond to these possible liability claims by taking out professional liability insurance in order to shift their risks of financial losses to insurance companies. In Chapter 12, I will examine the rules on professional liability insurance that apply to European architects.

Another way for architects to respond to these liability claims is to limit their liability towards clients. Architect liability, for instance, may be limited to its time, extent, and kind. In this chapter, the laws and rules on limitation of architect liability that apply to European architects will be examined to see in which of the five countries architects have more or better possibilities to limit their liability towards the client. In particular, I will describe the legal liability period, the contractual limitation of the liability period, the contractual limitation of the liability extent, and the limitation of the architect's personal liability in a private company with limited liability. Therefore, each section of this chapter contains four subsections.

I will frequently apply the notion exclusion clause to refer to clauses that are termed exclusion, exception, exemption, or limitation clauses. In literature, the notion exclusion clauses is often applied to describe clauses

649 As has been explained in the previous chapters, in each country, architects and clients can agree in the individual design contract whether architects are under an obligation of means or result regarding specific design duties.

relied on by a contract party to exclude or limit his liability towards another contract party.[650]

2. The Netherlands

2.1 Legal Liability Period

In the Netherlands, general claims for damages prescribe twenty years after acceptance of the design according to Article 3:306 BW, unless more specific regulations apply. Claims for damages as a result of shortcomings in the performance of a contract become prescribed five years after (i) the creditor discovered the shortcoming and (ii) is acquainted with the person liable.[651] In case law it was established that the notion 'acquaintance' implies not only an assumption of acquaintance, but 'real' acquaintance.[652] Furthermore, if the creditor had not discovered the damage, in Article 3:310 BW a twenty-year liability period has been established. This period starts after the damage is caused.[653] According to Article 6:89 BW, the client is not entitled to claim damages if he has not filed a protest against the architect in reasonable time after he (should have) discovered the failure. This is called *rechtsverlies*.

According to Article 6:75 BW, architects are not liable for the client's damage if the shortcoming in their performance can not be imputed to their fault, or if the consequences of the shortcoming shall not be borne by the architect by virtue of the law, a legal act, or according to common opinion.[654]

2.2 Contractual Limitation of Liability Period

As explained earlier, Dutch design contracts are mostly covered by standard conditions that provide detailed rules on the mutual rights and obligations of the contracting parties. Usually, the SR 1997 and DNR 2005 apply to Dutch design contracts. In these standard conditions, rules on the limitation of the architect's liability period have been established.[655]

According to Article 19 Section 1 SR 1997 and Article 16 Section 1 DNR 2005, architect liability expires after five years from the day on which the

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650 See also Furst and Ramsey, 2006, no. 3-078.

651 According to Article 3:310 BW.

652 *Hoge Raad* 31 October 2003, *Rechtspraak van de Week* 2003, p. 169; *Hoge Raad* 6 April 2001, *Nederlandse Jurisprudentie* 2002, 383; *Hoge Raad* 26 January 2007, *Nederlandse Jurisprudentie* 2007, 77.

653 See Asser/Hartkamp 2000 (I), no. 474.

654 See, for example, Brunner and De Jong, 2004, nos. 128ff; Asser/Hartkamp 2000 (I), nos. 322, 311ff.

655 Besides that in the RVOI-2001, Article 16, rules on the limitation of the advisor's liability have been established. See Chao-Duivis, Koning, and Leijgraaf, 2004, pp. 43-44.

assignment ends by means of fulfilment or cancellation of the contract.[656] According to Article 16 Section 2 DNR 2005, the client has to give the architect a written notice of default after he has discovered or should have discovered the architect's shortcoming. If he does not, he will be deprived of his right to claim damages. The client's right to claim damages for the architect's shortcoming expires two years after this notice of default.[657]

So the rules from the SR 1997 and DNR 2005 deviate from the general twenty-year liability period that applies to Dutch architects on behalf of general contract law. The more specific rules that have been established in these standard conditions show a five-year liability period.

2.3 Contractual Limitation of Liability Extent

In Dutch standard conditions, architect liability is often limited to its extent as well. In particular, architect liability is limited to the advisory costs or the architect's fee.[658] The SR 1997 knows a clear distinction between full and limited construction assignments. Regarding full construction assignments[659], in the SR 1997, architect liability is limited to a maximum of € 68 067 or, if the architect's fee is more than € 68 067, to the architect's fee with a maximum of € 680 670.[660] Regarding limited construction assignments[661], the compensation equals the architect's fee, again with an upper limit of € 680 670. So the difference is that regarding full assignments, the damage is integrally compensated to € 68 067, even if the architect's fee is less than this amount.[662]

The DNR 2005 also provides rules on the limitation of the extent of architect liability.[663] According to Article 15 DNR 2005, the architect's compensation of the client's damage equals the advisory costs[664] with a maximum of € 1 000 000. If these advisory costs are less than € 75 000, however, the compensation can be at most € 75 000.[665] As a result, damages are integrally compensated to € 75 000, which resembles the rule from the SR 1997. This rule has been established for the benefit of consumers in

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656 Bruggeman, 2007, p. 52.

657 Article 16 Section 3 DNR 2005. See also Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 277.

658 Http://www.cobouw.nl/paginas/rubrieknews.asp?RID=7andID=26294 (accessed on 30 November 2005).

659 See Chapter 2, Section 1 for a definition of these contracts.

660 Article 18 SR 1997.

661 See Chapter 2, Section 1 for a definition of this contract.

662 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 275.

663 See also Bruggeman, 2007, p. 51.

664 These costs cover the advisor's fee, the costs for supervision and any additional costs according to Article 1 DNR 2005; Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 265.

665 Article 15 Section 2 DNR 2005.

particular.[666] In the event of large-scale design failures, however, the advisory costs only constitute a small part of the total construction sum, approximately 10 %. Because the actual damage is often far greater, clients usually bear a large part of the damages.[667]

A final contractual limitation of architect liability is that architects are only liable for damage that *directly* results from their culpable fault or negligence.[668] This covers the client's damage if (parts of) the works have to be performed again, for example.[669] According to the DNR 2005, loss of profits or other company related losses are not included.

2.4 Limitation of Personal Liability

Neither the Dutch Civil Code, nor the common Dutch standard conditions or the BNA[670] bring on provisions according to which architects are not allowed to limit their personal liability. In absence of such provisions, general law of legal persons applies (Book 2 BW on legal entities) in case architects perform their activities in a legal entity such as a private company with limited liability (*besloten vennootschap*). This implies that the legal entity as such is to be considered the contracting party. Architects are employed by this legal entity and as possible shareholders their liability is limited to the extent of their share or for the proportion of the subscribed stock.

3. Belgium

3.1 Legal Liability Period

For a long time, liability claims on the basis of a contractual agreement became prescribed after thirty years according to Article 2262 old *Belgisch Burgerlijk Wetboek*. However, this thirty-year liability period has been reduced to a ten-year liability period since the *Wet van 10 juni 1998*[671]. This ten-year period has been established in Article 2262bis *Belgisch Burgerlijk Wetboek*.[672] Regarding design contracts in specific, different liability periods

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666 Moreover, according to Article 15 Section 2 DNR 2005, being a consumer is a requisite to apply the DNR. According to Articles 6:232, 6:236, and 6:237 BW, if one of the contracting parties is a consumer, the validity of the architect's limitation clauses in standard conditions may be affected.

667 Http://www.ibr.nl/ActualiteitenBR/ShowItem.asp?id=1482 (accessed on 3 November 2006).

668 Articles 13 SR 1997, and 13-14 DNR 2005.

669 Bruggeman 2007, p. 50.

670 For example by means of disciplinary rules.

671 Wet van 10 juni 1998, *B.S.* 17 July 1998.

672 Burssens, 2001, no. 180.

apply. In Belgium an important distinction in liability before acceptance and liability thereafter has been made.[673]

Before acceptance of the works, Articles 1137, 1146, and 1789 *Belgisch Burgerlijk Wetboek* determine that architects are liable for not, not timely, or defectively performing their contract towards the client. Architects are liable for the nonfulfilment of the contract due to their negligence. So, architects have to fulfil the specific provisions of the agreement and their professional obligations, such as professional conduct and skill (see Chapter 4 for more on this issue).[674]

After acceptance of the works, Articles 1792 and 2270 *Belgisch Burgerlijk Wetboek* apply to Belgian architects. Accordingly, architects are liable towards the client for defects to buildings or sizeable works[675] for a period of ten years after acceptance of the works if the (partial) perish of the works is at stake.[676] According to case law, this requirement of (partial) perish is not yet complied with if the building can not fulfil its normal purpose any longer, however.[677] It should be known for certain that, either short-term or long-term, the solidity of the building will be in danger.[678] However, the danger of instability has to be existing and certain, not hypothetical. For example, defects regarding the stability of the building, moisture as a result of defective roofing, leakages and cracking in the cables of a central heating system[679], and considerable cracking in the bricklaying are considered to be defects that (partially) perish the works.[680] Damage to the waterworks in an apartment building, coming loose of painting, defective acoustic isolation, and the condensation of double-glazing were not considered defects regarding the stability of the building.[681]

So, after acceptance of the works, architects are no longer liable for (slight) visible defects.[682] However, architects remain liable for hidden defects that

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673 Deketelaere, Schoups, and Verbeke, 2004, nos. XI. 15-22.

674 Baert, 2001, nos. 1171-1172.

675 These sizeable works (*gros ouvrages*) are immovables, such as houses, bridges, swimming pools, the covering of a house top, or paved roads. According to literature, painting of façades, tile-work, or demolition works are no such sizeable works. See Baert, 2001, nos. 1431-1435; Burssens, 2001, no. 279; *Hof van Cassatie België*, 18 October 1973, *Pasicrisie Belge*, 1974, pp. 185-189; *Hof van Cassatie België*, 15 December 1995, *Pasicrisie Belge*, 1995, p. 1171.

676 See for instance *Hof van Cassatie Belgie*, 5 May 1967, *Pasicrisie Belge*, 1967, p. 1046; *Hof van Cassatie Belgie*, 17 October 1968, *Pasicrisie Belge*, 1969, pp. 181-190; *Hof van Cassatie België*, 4 March 1977, *Pasicrisie Belge* 1983, pp. 721-722; *Hof van Cassatie België* 24 February 1983, *Pasicrisie Belge* 1983, pp. 716-719.

677 Burssens, 2001, no. 280; *Hof van Cassatie België*, 8 June 1979, *Pasicrisie Belge*, 1979(I), p. 1152; *Brussel*, 15 March 1996, *Res et Jura Immobilia* 1997, p. 21.

678 Burssens, 2001, no. 280.

679 *Hof van Beroep Brussel*, 15 February 1988, *Tijdschrift voor Aannemingsrecht* 1992, p. 70.

680 Deketelaere, Schoups, and Verbeke, 2004, nos. XI.95-97.

681 Burssens, 2001, no. 280.

682 Baert, 2001, no. 1238.

do not affect the solidity of the works.[683] But architects are only liable for these defects if the client shows that the building has a defect that was hidden at the moment of accepting the works. Furthermore, the client has to prove that the architect was negligent and he has to claim damages within a reasonable period after discovering the defect.[684] The architect's negligence has to be determined by taking into regard the architect's capabilities and qualities. For example, if the design assignment and the architect's specialisation point out an obligation of result, the client does not have to prove the architect's negligence.[685]

Architects are not liable for the damage (even damage due to severe defects that falls under the scope of Article 1792 *Belgisch Burgerlijk Wetboek)*, however, if they can prove to have taken all required precautionary measures. For example, regarding damages as a result of unfitness of the soil, the architect has to prove that he has meticulously examined the soil conditions, has sufficiently taken into account the impact of the building works to the soil, and has taken into account the specialist literature that was relevant.[686]

Neither are architects liable if they can prove that the shortcoming was due to *overmacht* (*force majeure*), which can not be attributed to them.[687] Judges tend to be rather stringent when determining whether or not the architect can claim that his non-performance was due to a *force majeure*. A *force majeure* has to be the result of an unforeseeable, insurmountable, and extern event that makes the performance of the contract definitive impossible. For example, the single fact that an architect can not obtain a building license is insufficient to constitute a *force majeure*.[688]

3.2 Contractual Limitation of Liability Period

Belgian architects are allowed to include clauses in the design contract that limit the period of their liability towards the client.[689] However, in practice, these clauses seem to have little influence. The ten-year liability that has been established in Articles 1792 and 2270 *Belgisch Burgerlijk Wetboek* is of public order because of the public risk and safety character of construction and architect law.[690] As a result, clauses limiting the ten-year liability period

683 *Hof van Cassatie* 25 October 1985, *Arresten van het Hof van Cassatie* 1985-1986, 270; Deketelaere, Schoups, and Verbeke, 2004, no. XI. 18; Baert, 2001, no. 1236.

684 Deketelaere, Schoups, and Verbeke, 2004, nos. XI. 18-20; Burssens, 2001, no. 282.

685 Burssens, 2001, no. 282.

686 Burssens, 2001, no. 283.

687 Articles 1147 and 1148 *Belgisch Burgerlijk Wetboek;* Burssens, 2001, no. 479

688 Burssens, 2001, no. 479.

689 This is called a *bevrijdingsbeding*, which excludes the contract parties' own liability; Baert, 2001, no. 1185.

690 Baert, 2001, nos. 1193-1196, 1403-1409.

that applies to architects are not allowed.[691] The ten-year liability period ends ten years after the client's approval of the architect's design.[692]

3.3 Contractual Limitation of Liability Extent

Standard conditions are not commonly used in Belgian architect law and architect liability is therefore not limited by means of exclusion clauses in standard conditions. However, architects may include specific clauses in the individual design contract, for instance clauses limiting architect liability resulting from bad soil examinations. Clients must have explicitly agreed upon these clauses, however. According to case law, such specific clauses apply when the damage arising from the instability of the soil was unforeseeable.[693]

As Article 4 *Architectenwet* (which obliges clients to hire an architect for their design activities, see Chapter 3) has a public order character, clauses that limit the extent of the architect's liability are void.[694] However, in case law this has been refined. Accordingly, architects may limit their liability towards clients regarding certain technical design services for which architects have not been sufficiently educated and which therefore do not fall under their authority.[695] Architects usually hire a specialised engineer in these events. However, architects may still be liable for the negligence of this specialist if this negligence could have been discovered by the architect because of his own professional skill.[696]

In any case, architects are not allowed to limit their liability towards the client for damage to severe hidden defects that has been established under Articles 1792 and 2270 *Belgisch Burgerlijk Wetboek.* These articles are of public order.[697]

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691 Burssens, 2001, nos. 303-304.

692 Burssens, 2001, no. 285.

693 *Brussel* 6 June 1986 *Res et Jura Immobilia,* no. 6097; *Luik* 17 October 1979 *Jurisprudence de Liège* 1980, p. 73. Following *Brussel* 13 December 1979, *R.G.* 1868, p. 77, architects may have to carry out soil drillings when necessary; *Cour de Cassation Civile Nivelle* 14 September 1976, *Res et Jura Immobilia* 1977, no. 5576; *Brussel* 13 March 1972, *Revue Critique de Jurisprudence Belge* 1974, p. 513; *Tournai* 8 June 1983, *Tijdschrift voor Aannemingsrecht* 1984, p. 186; *Bergen* 3 June 2002, *Revue Générale des Assurances et des responsabilités* 2003, no. 13765/1.

694 Burssens, 2001, no. 305; CEA Belgium, 2004, pp. 2/3.

695 Burssens, 2001, nos. 106, 303-304.

696 Burssens, 2001, no. 305.

697 Burssens, 2001, no. 304.

3.4 Limitation of Personal Liability

Until recently, Belgian architects were allowed to be united in a partnership, but not in one with limited liability.[698] As a result, Belgian architects were not able to limit their personal liability.[699] This rule was established because of the client's obligation to hire an architect for his design activities, based on Article 4 *Architectenwet*.[700] From a 2004 study, it appeared that Belgian architects were outsiders in Europe as only Belgian and Italian architects are still personally liable towards the client. In the other Member States of that time (13), architects are limitedly liable towards the client because they can perform their activities in a partnership.[701]

Instead of architects, Belgian building contractors and engineers, on the other hand, were allowed to escape their personal liability by performing their professional activities in a private company with limited liability.[702] Although this rule seemed discriminatory to Belgian architects, the *Arbitragehof*[703] had determined that this distinction between architects and building contractors was both objectively and fairly justified, because architect liability is of a personal nature since the legislator ascribed the design activity exclusively to architects.[704]

However, in 2007, the *Wet betreffende de uitoefening van het beroep van architect in het kader van een rechtspersoon* (Regulations on Performing the Profession of Architect within the Framework of a Legal Entity, *Laruelle wet*)[705] came into effect. This *Laruelle Wet* provides rules on the limitation of architect liability in a private company and the obligation of architects to take out professional liability insurance[706]. The law aims at providing Belgian

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698 Italian architects are not allowed to perform his professional activities in a private company with limited liability but instead of the severe ten-year liability period to Italian architects sort of a civil non-liability after the reception applies; *Centre d'études d'assurances*, 2004*; Hof van Cassatie*, 27 April 2001, *Rechtskundig Weekblad* 2002-2003 (66), p. 1218; Burssens *(et al)*, 2007, p. 33.

699 Burssens, 2001, no. 54.

700 Deketelaere, Schoups, and Verbeke, 2004, p. 851; Burssens *(et al),* 2007, pp. 11-12.

701 CEA Belgium, 2004, p. 3/3; *Belgische Kamer van Volksvertegenwoordigers, Wetsontwerp betreffende de uitoefening van het beroep van architect in het kader van een rechtspersoon* (Belgian Lower House, Bill on the Performance of the Profession of Architects in a Legal Entity), 7 July 2005, DOC 51 1920/001, p. 4 (Memorie van Toelichting (Explanatory Memorandum)); Burssens *(et al),* 2007, pp. 11-12, 68.

702 Burssens *(et al)* 2007, p. 33.

703 This *Arbitragehof* was established in 1980. Since May 2007 it is called *Grondwettelijk Hof*. It is a court of justice with twelve judges watching over the observance of the Constitution by legislators in Belgium. See also Burssens *(et al)* 2007, p. 12 and http://www.arbitrage.be.nl.

704 *Arbitragehof* 10 October 2001, *Belgisch Staatsblad* 1 December 2001, no. 41279; Deketelaere, Schoups, and Verbeke, 2004, p. 851; Burssens, *(et al)* 2007, p. 12.

705 C-2006/22282.

706 See Burssens *(et al)* ,2007, pp. 20-27 and Chapter 12 of this study.

architects a more balanced statute with regard to their European colleagues by allowing them to perform their professional activities in partnership so that they are no longer personally liable towards the client.[707]

It was argued that clients benefit from this because a legal entity is mostly better capable to face the liability risks of the profession's complexities than the architect himself. Moreover, legal entities are a permanent structure and stand up to the ups and downs of natural persons (such as illness).[708] For architects, performing their activities in partnership facilitates passing on their customers at the end of their career to their successor and it avoids the subsisting of the ten-year personal liability towards the client if architects have stopped providing their services.[709]

4. France

4.1 Legal Liability Period

According to Article 2262 *Code Civil*, general contract law, liability claims become prescribed after thirty years. However, regarding liability based on Articles 1792 and 2270-1 *Code Civil,* which cover architect liability in specific, liability claims of clients towards architects become prescribed after ten years as from reception of the works. This is similar to Belgian contract law. In 2002, the French *Cour de Cassation* in an annual report suggested to harmonise these two liability periods of 2262 and 2270-1 *Code Civil*. Up till now, the general thirty-year liability periods still exists, however.[710]

As in Belgium, there is a distinction between architect liability before and after the acceptance of the works. *Before* acceptance of the works, Article 1147 *Code Civil* applies. According to this article, clients are entitled to damages in case of non-performance of design duties by the architect or in case of delay of performance, unless when the non-performance was due to a *cause étrangère*. Clients have to prove the architect's negligence and causality within ten years after the damage was discovered.[711]

There is much case law according to which architects were held liable on the basis of this Article 1147 *Code Civil*. For example, an architect who had given the order to start the construction works without checking whether the client had been able to achieve the building license was held liable for

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707 See, for instance, Burssens (et al) 2007, p. 68.

708 *Sénat de Belgique, Annales*, 23 March 2006, no. 3-155. See also Burssens *(et al)* 2007, pp. 68-69.

709 *Belgische Kamer van Volksvertegenwoordigers, Wetsontwerp betreffende de uitoefening van het beroep van architect in het kader van een rechtspersoon* (Belgian Lower House, Bill on the Performance of the Profession of Architects in a Legal Entity), 7 July 2005, DOC 51 1920/001, p. 5 (Memorie van Toelichting (Explanatory Memorandum)).

710 Darnet, Depuy, and Gendre, 2005, no. 264.

711 Saint-Alary, 2003, p. 158; Darnet, Depuy, and Gendre, 2005, p. 108.

negligence on the basis of this article.[712] And an architect who had not investigated the sales promiss as a result of which the client had believed that he had permission to build, was held liable for negligence for the client's damages also.[713] On the other hand, an architect whose design assignment did not include a cost estimation of the works, was not held liable for the client's financial damage as the works should have never been undertaken because of the client's insufficient budget.[714]

As Belgian architects, French architects are also subject to a ten-year liability period *after* the acceptance of the works, according to Article 1792 *Code Civile,* which is called *la garantie décennale*.[715] According to this article, architects are strictly liable for damage affecting the construction's solidity or essential elements of the building that result in a construction that is unsuitable for its purpose. For example, traditional building works, civil engineering works, and certain elements of a building that form an indissociable part of the site development, foundation, framework and covering works.[716]

The only escape from this ten-year liability is when the architect can prove a *cause étrangère*.[717] A *cause étrangère* may exonerate from liability if an outside influence caused the damage, for instance a *force majeure*, *fait de la victime,* or *fait du tiers*.[718] I will shortly describe them.

Firstly, a *force majeure* may entirely exclude architect liability. Certain event is considered a *force majeure* if it is *irrisistible, imprévisible*, and *extérieur à la cause immediate et directe du dommage* (uncontrollable, unforeseeable, and not an immediate and direct cause of the damage).[719] One could think of exceptional phenomena such as bad weather, snow, drought, freezing rain, or high tide.[720] However, a *force majeure* seldom occurs. Judges are not often

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712 Huet, 2004, p. 202.

713 *Cour de Cassation* C*ivile* 3, 21 June 2000, Blanc c/ Beraud, *Juris-Data* no. 2670.

714 *Cour de Cassation Civile* 3, 1 December 1999, *SCI L'Étoile verte c/ Leyrit*, *RDI* April-June 2000.

715 The French Article 1792 has a wider scope than the Belgian Article 1792 *Belgisch Burgerlijk Wetboek*. See Chapter 4, Section 2.3.

716 Article 1792-2 *Code Civile*.

717 Darnet, Depuy, and Gendre, 2005, p. 111; Saint-Alary and Saint-Alary-Houin, 2003, p. 157. This presumption of fault (which means that notifying the damage is sufficient to establish liability and the building contractor can only be exonerated by proving an external cause) also applies to damages to the essential elements of a building that form an integral part (if their demolition, dismantlement or replacement is only possible by damaging or removing parts of the building) of the building's viability, foundations, skeleton, estate or accommodation (Article 1792-2 *Code Civile).*

718 Huet, 2004, p. 200; Saint-Alary and Saint-Alary-Houin, 2003, p. 157; Liet-Veaux, 1994, p. 402.

719 Huet, 2004, p. 200.

720 Defects in materials are not included. Auby and Périnet-Marquet, 1992, p. 521; Huet, 2004, p. 200; Saint-Alary, 2003, p. 157; Liet-Veaux, 1994, p. 141. Darnet, Depuy, and Gendre, 2005, p. 112; *Cour de Cassation Civile* 3, 13 May 1986: *Gazette du Palais* 1986, 1,

inclined to consider bad weather conditions as a *force majeure*. Even an official warning for natural disaster or intensely hail storms do not necessarily imply a *force majeure*.

Secondly, the client's intervention in the design activity may limit architect liability if the client has notorious competence and if his intervention is not the result of the architect's carelessness or negligence.[721] However, it seldom occurs that the client has such notorious competence.[722] Often, shortcomings in the exchange of information between clients and architects constitute a (partial) *cause étrangère* for the architect's liability towards the client, such as when the client had made the damages worse by taking measures that were contradictory to the supplier's indications.[723] Furthermore, the client's intervention may limit architect liability in case of bad application of the works, for example if the client overloads tiles despite of the architect's instructions not to do so.[724] Obviously, deliberately taken risks taken by the client will exonerate the architect from liability as well.[725]

Thirdly, an action of a third party (for instance a building contractor or entrepreneur) may limit architect liability if it is *imprévisible* (unforeseeable) and *inévitable* (unavoidable).[726] An entrepreneur, for instance, was held to recover his breach of the *règles de l'art* because he had the skill and knowledge to discover this breach. He had to verify and check the architect's design (as a result of which he may suggest modifications) and the adjustments to other parts of the construction process.[727]

So, as we have seen, Article 1792 *Code Civil* imposes a ten-year liability period to architects, *after* acceptance of the works, regarding damages affecting the construction's solidity or essential elements of the building that result in a construction that is unsuitable for its purpose (*la garantie décennale*). This implies that Article 1792 *Code Civile* covers damage to the solidity of the works.[728]

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pan, p. 167; *Cour de Cassation Civile* 1, 7 July 1998: *Revue trimestrielle de droit immobilière*, 1999, p. 106; *Cour de Cassation Civile* 3, 7 October, 1998: *Revue trimestrielle de droit immobilière*, 1999, p. 106.

721 Liet-Veaux, 1994, p. 341.

722 The *Cour de Cassation* consistently sanctions decisions that do not report or distinguish this notorious competence of the client. So the client will not be liable if the proof of his intervention or of his notorious competence has not been given account of. See Darnet, Depuy, and Gendre, 2005, p. 115.

723 Darnet, Depuy, and Gendre, 2005, p. 114.

724 Darnet, Depuy, and Gendre, 2005, p. 114; *Cour de Cassation, 3e civile*, 8 July, 1998: *JCP* G 1998, IV, 3020.

725 Darnet, Depuy, and Gendre, 2005, p. 115.

726 Huet, 2004, p. 200; Auby and Périnet-Marquet, 1992, p. 521ff. This is called *fait de la victime* (a victim's action).

727 An action of a third party will more easily be established if this action was independent or in advance of the construction process. According to case law, the architect remains responsible in most cases, however; Darnet, Depuy, and Gendre, 2005, p. 113.

728 Article 1792-2 *Code Civile*.

Other elements of the building, those elements that are dissociable from the building such as boilers or carpet[729], are subjected to *la garantie biennale du bon fonctionnement* during two years as from the reception according to Article 1792-3 *Code Civil*. This guarantee of proper functioning was introduced by the *Loi relative á la responsabilité et á l'assurance dans le domaine de la construction 1978* (Regulations on Liability and Insurance for Construction, Loi Spinetta)[730]. The guarantee applies to all persons that are also subject to the ten-year liability period.[731] In case law, the scope of application of the *garantie de bon fonctionnement* has been considerably limited, however, for the benefit of the ten-year liability period.[732] As with the *garantie décennale*, architects are not liable under the *garantie biennale* in case of a *cause étrangère*.[733]

Finally, the *garantie de parfait achèvement* (article 1792-6 *Code Civil*) applies to entrepreneurs during one year after the reception of the works.[734] However, it may also entail obligations for architects. If architects are under the duty to supervise the works[735], the *garantie de parfait achèvement* may apply.[736] Often, this one-year liability period supplements the other liability periods. It is an extra assurance for the client because the architect's fault is presumed; the client does not have to prove his negligence.[737] So the client can choose between *la garantie de parfait achèvement* and the contractual liability on behalf of general contract law.[738]

4.2 Contractual Limitation of Liability Period

As in Belgium, the architect's liability period can not be contractually modified. Every contractual clause limiting the liability established in Article 1792ff *Code Civile* is considered to be *non écrit* (nonexistent).[739] This is because article 1792 *Code Civile* is of public order.[740]

Furthermore, *la garantie de bon fonctionnement* can not be limited either since, as the ten-year liability period, this two-year liability period is of

729 See for more examples Darnet, Depuy, and Gendre, 2005, p. 124, no. 345.
730 *Loi no. 78-12 du 4 janvier 1978 (Journal Officiel de la Republique Française du 5 janvier 1978).*
731 Darnet, Depuy, and Gendre, 2005, p. 124.
732 Darnet, Depuy, and Gendre, 2005, p. 125.
733 Saint-Alary and Saint-Alary-Houin, 2003, p. 155.
734 Darnet, Depuy, and Gendre, 2005, p. 125; Huet, 2004, p. 199.
735 See Chapter 10.
736 Huet, 2004, p. 199.
737 Huet, 2004, p. 199.
738 Darnet, Depuy, and Gendre, 2005, p. 126.
739 Article 1792-5 *Code Civile*.
740 Huet, 2004, p. 228; Saint-Alary and Saint-Alary-Houin, 2003, p. 157; *Centre d'études d'assurances*, 2004, pp. 2/3.

public order.[741] *Finally, la garantie de parfait achèvement* can not be limited as it is just a one-year supplement to other liability periods.[742]

4.3 Contractual Limitation of Liability Extent

As standard conditions are not commonly applied to design contracts in France, architect liability is not likely to be limited in standard conditions either. However, as in Belgium, French architects are allowed to contractually agree on exclusion clauses, as long as these do not limit the damage under Article 1792 *Code Civile* as this would interfere with the public order character of that Article.

4.4 Limitation of Personal Liability

Neither the French *Code Civil*, nor the other French laws that apply to design contracts or the *Ordre des Architectes*, entail provisions according to which architects are not allowed to limit their personal liability.[743] In absence of such provisions, general law of legal persons apply (See *Code de Commerce* on legal entities) i.e. in case architects perform their activities in a legal entity such as a private company with limited liability; *societé à responsabilité limitée* (limited liability company, SARL) or *enterprise unipersonnelle à responsabilité limitée* (limited liability companies under sole ownership, EURL).[744] This implies that the legal entity as such is to be considered the contracting party. Architects are employed by this legal entity and as possible shareholders their liability is limited to the extent of their share or for the proportion of the subscribed stock.

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741 Saint-Alary and Saint-Alary-Houin, 2003, p. 157; Darnet, Depuy, and Gendre, 2005, p. 124.

742 Saint-Alary and Saint-Alary-Houin, 2003, p. 159.

743 *Loi sur l'architecture*; *Centre d'études d'assurances*, 2004; *Loi maîtrise d'ouvrage publique* (Act on controlling public works), no. 85-704, 12 July 1985.

744 Although in France liberal architects still constitute the core of the profession (60 %), associated architects are increasing. Almost 4 000 French architects (20 % of all architects) are associated nowadays, most of them in *societé à responsabilité limitée* (limited liability companies, SARL) or *enterprise unipersonnelle à responsabilité limitée* (limited liability companies under sole ownership, EURL). Other private companies are the *societé anonyme* (SA), the *societé par actions simplifiée* (SAS), the *societé par actions simplifiée unipersonelle* (SASU), and the *societé coopérative de production sous forme de sarl à capital variable* (SCOP SARL). Architect's Order, 2005, p. 10; http://www.architectes.org /exercer-la-profession/responsabilites-et-assurances/la-responsabilite-professionelle (accessed on 15 December 2006).

5. Germany

5.1 Legal Liability Period

Under the former BGB rules, German architects were liable towards the client for the non-performance of the design contract during 30 years after reception of the works. So the client's liability claims became prescribed after 30 years.[745] However, as a result of the *Schuldrechtsmodernisierung*, as from 1 January 2002 other rules apply.[746]

According to § 195ff BGB, architects are liable towards the client during three years after the reception of the works.[747] This period starts running at the end of the year in which the liability claim originated, or at the moment that the client knew or should have known about the damage[748].

In § 634a BGB, special rules have been established in addition to this general rule (three-year liability) from § 195 BGB. This is because the German design contract is a *Werkvertrag* and the rules from 634ff BGB therefore apply to German architects.[749] According to § 634a (1)-1 BGB, a two-year liability period applies *bei einem Werk, dessen Erfolg in der Herstellung (*manufacturing), *Wartung* (maintenance) *oder Veränderung* (variation) *einer Sache oder in der Erbringung von Planungs- oder Überwachungsleistungen* (design or supervision performances) *hierfür besteht*. And a five-year liability period applies *bei einem Bauwerk und einem Werk, dessen Erfolg in der Erbringung von Planungs- oder Überwachungsleistungen hierfür besteht.*[750]

Finally, in case of intentional faults, according to § 634a under 3, a three-year liability period applies as well.[751]

5.2 Contractual Limitation of Liability Period

German architects are allowed to limit their professional liability period towards the client according to § 305 to 310 *Bürgerliches Gesetzbuch*. These provisions provide rules on general conditions that may apply to design contracts. Accordingly, clients and architects can apply *Allgemeine Geschäftsbedingungen* (general conditions on transactions) to design contracts in which exclusion clauses have been established.[752] However, architects and

745 § 638 BGB; Niestrate, 2002, nos. 295-296; Werner/Pastor, 2008, no. 2343.
746 See Werner/Pastor, 2008, no. 2343.
747 Werner/Pastor, 2008, no. 2343.
748 § 199 under 1 BGB.
749 See Niestrate, 2002, no. 297; Löffelmann/Fleischmann, 2007, nos. 1906-1911.
750 § 634a (2)-2 BGB.
751 Niestrate, 2002, no. 297; Löffelmann/Fleischmann, 2007, no. 1910.
752 § 305 BGB.

clients may also individually agree on exclusion clauses in the design contract (§ 305b BGB). Usually, limitation clauses have been established in the *Allgemeine Vertragsbestimmungen zum Einheits-architektenvertrag* (General Contractual Clauses for Standard Design Contracts AVA) and in *Formularverträgen* (model contracts[753] they apply to specific projects).[754]

Until 2001, the *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* (AGBG) applied as well. However, since the *Schuldrechtsmodernisierung*, the AGBG have been integrated in the BGB. In case of *vorformulierten* (phrased beforehand) clauses, their content has to be conform §§ 305ff BGB. In case of individual agreements on limitation of liability such conformity check is not required, however.[755]

5.3 Contractual Limitation of Liability Extent

Furthermore, German architects are allowed to limit the extent of their liability in individual contract terms (*Individualvereinbarung*) or in general conditions as well.[756] In § 307 BGB, specific rules have been established on whether or not such clauses are effective. For example, if a clause, according to *Treu und Glauben* (good faith), harms the opposite party it is ineffective. And if the object of the clause is not clear it is ineffective as well. In addition, in § 309 BGB under 8, specific circumstances have been described according to which exclusion clauses are not valid.[757] These rules concern *Ausschluss des Rechts sich vom Vertrag zu lösen* and clauses that limit fulfilment of the assignment, for instance.

According to general contract law, clauses that try to fully exclude intentional behaviour, *grobes Verschulden* (gross negligence), or deceit, are void because they violate § 242 BGB.[758] Clauses limiting the client's possible claim for specific performance are not allowed either. Only when it is unreasonable to require specific performance of the architect, such limitation clauses are allowed.[759] Clauses with the intention to limit the liability sum are only valid if the liability sum is still reasonable in relation to the design and corresponds to the expected damage. It will be very difficult, however, to draft such clauses as the expected damages are often unclear of course.

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753 These standardized contracts can apply to design contracts in individual projects. Clients and architects are free to individually negotiate the exact terms and conditions of the design contract, however. See also Dierikx, 2008, pp. 215-126 on the function of model contracts in Belgian construction law.

754 Niestrate, 2002, no. 442; Locher, 2005, no. 474.

755 Locher, 2005, no. 391; Leineweber, 2000, nos. 73f.

756 Niestrate, 2002, no. 443; Werner/Pastor, 2008, nos. 2141f, 2349.

757 Thode/Wirth/Kuffer, 2004, p. 617 no. 70.

758 § 309 no. 7b BGB; § 5 under 1 § 2 AVA; Leineweber, 2000, no. 86.

759 Niestrate, 2002, nos. 451-453.

For each individual case will have to be determined whether or not clauses that try to limit the liability sum are valid.[760]

As has been explained in Chapter 10 of this study, usually, German architects are hired by the client as *Sachwalter*. This position implies important obligations for architects. Therefore, it has been argued that full limitations of liability for *leichte Fahrlässigkeit* (simple negligence) do not correspond to this *Sachwalter* position.[761] Liability for *leichte Fahrlässigkeit* may only be limited if at least the expected damages are covered.[762] According to § 5.3 AVA, for instance, liability for insured damages due to simple negligence may be limited to € 500 000 for personal injury and € 75 000 for other damage.

5.4 Limitation of Personal Liability

Neither in German legislation nor in rules from the BAK or BDA provisions have been established according to which architects are not allowed to limit their personal liability.[763] In absence of such provisions, general law of legal persons applies (See GmbH-*Gesetz*). According to these clauses, architects can perform their activities in a legal entity such as a private company with limited liability (*Gesellschaft mit beschränkter Haftung, GmbH*). This implies that the legal entity as such is to be considered the contracting party. Architects are employed by this legal entity and as possible shareholders their liability is limited to the extent of their share or for the proportion of the subscribed stock.[764]

6. England

6.1 Legal Liability Period

The Limitation Act 1980[765] imposes time limits within which actions must be brought.[766] According to Section 5 of this Act, an action founded on a simple contract[767] (such as the legal assignment between architect and client) should be brought within six years from the moment when the breach of contract

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760 Niestrate, 2002, nos. 461-464

761 Niestrate, 2002, no. 450.

762 § 307 BGB, Niestrate, 2002, nos. 449-450; Thode/Wirth/Kuffer, 2004, p. 617 no. 71.

763 See also Leineweber, 2000, no. 17.

764 See Locher, 2005, nos. 593f; Leineweber, 2000, no. 17.

765 1980 C. 58

766 Furst and Ramsey, 2006, nos. 15-011f.

767 This is a contract which is constituted by an offer made (orally or in writing) by one party and accepted by the other. The resulting agreement is enforceable if the promises it comprises are supported by consideration. Uff, 2005, p. 167.

occurs (not from its discovery).[768] It makes no difference to the limitation period in contract whether the client knows or should have known of the breach of contract.

Regarding construction law, latent damages will often occur. These are damages that manifest themselves some time after the act that caused it, for instance a building with foundations that are too shallow and therefore defective.[769] If these latent damages manifest more than six years after the reception, for clients this implies that they can not claim damages from the architect because of Section 5 Limitation Act. This problem has been frequently the object of disputes. In case law, a satisfactory solution has not yet been established, however.[770]

Because of this uncertainty in English law, in 1986, the Latent Damages Act was accepted. It was argued that clients should have a fair and sufficient opportunity of pursuing their claims for damages. Moreover, architects should be protected against claims for latent damages. So, in the 1980 Limitation Act a new Section 14A was inserted, which extends the limitation period for claims in tort by three years. Obviously, this provision has little effect in construction contract cases.[771] However, what is interesting is that there is an overriding time limit of 15 years for actions in for negligence (other than for personal injury), irrespective of latent damage. This is called the long-stop period and has been established in Section 14B Limitation Act 1980.[772] This period exceeds the six-year period that was established in the Limitation Act 1980 and thus give clients more time to claim damages from the architect, which is especially relevant for latent damages.[773] So, now there is a primary limitation period of six years after the date the breach of contract occurs and a final limitation period of fifteen years after the date on which the act that constituted the negligence occurred.

Design contracts may also include clauses that limit architect liability due to a *force majeure*. However, these will be treated as exclusion clauses and are therefore strictly interpreted.[774] According to English contract law, a *force majeure* includes man-made events and interventions, such as strikes or wars or legislation. A minimum requisite is that the event must be beyond control

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768 Furst and Ramsey, 2006, no. 15-012; Uff, 2005, pp. 213f; James, 2002, p. 249. An action founded on a contract by deed should be brought within twelve years of the date on which the cause of action accrues (Section 6 Limitation Act 1980). A contract by deed is a contract that binds its maker without need of any exchange of obligations; Uff, 2005, p. 167; Wallace, 1995, no. 1.017.

769 James, 2002, pp. 248, 251.

770 See for an extensive overview of case law on this topic James, 2002, pp. 251-256. See also Furst and Ramsey, 2006, no. 15-014.

771 Furst and Ramsey, 2006, no. 15-014; James, 2002, p. 257.

772 James, 2002, p. 258.

773 Furst and Ramsey, 2006, no. 15-014.

774 Wallace, 1995, nos. 1.236-1.237.

of the party relying on it. However, in English case law, the force majeure does not have received much interpretation.[775]

6.2 Contractual Limitation of Liability Period

Architects are not allowed to limit the liability period that has been established in the Limitation Act 1980.[776]

6.3 Contractual Limitation of Liability Extent

English architects often limit the extent of their liability in standard form contracts.[777] There are several requirements, however. Firstly, as a rule, exclusion clauses that have a scope that is too wide are unlikely to limit specific liability. Clauses limiting architect liability at a specified sum are more likely to give effect than general clauses.[778] Furthermore, these clauses must be incorporated into the contract or in any case be brought to the attention of the other party. And, thirdly, exclusion clauses should expressly refer to negligence in order for them to be effective.[779] The clauses must adequately cover the breach of contract in question.[780]

In addition to these common law requirements, the Unfair Contract Terms Act 1977 (UCTA)[781] also provides important rules on the effectiveness of exclusion clauses.[782] In particular, this Act imposes limits on the ability of

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775 Wallace, 1995, no. 4.267; *British Electrical Industries Ltd. v Patley Pressings* (1953) 1 Weekly Law Reports 280.

776 Uff, 2005, p. 213; James, 2002, p. 249; Wallace, 1995, no. 1.017.

777 Uff, 2005, p. 183; James, 2002, p. 20; May, 1995, p. 64.

778 Uff, 2005, p. 183. If the plaintiff signs a document having contractual effect containing an exclusion clause, it will automatically form part of the contract and he is bound by its terms (*L'Estrange v Graucob* (1934) 2 King's Bench 394). However, according to *Curtis v Chemical Cleaning Co* (1951) 1 King's Bench 805, even a signed document can be rendered wholly or partly ineffective if the other party has made a misrepresentation as to its effect; *Rutter v Palmer* (1922) 2 King's Bench 87 at 92 (Court of Appeal).

779 May, 1995, pp. 64-65; *Canada Steamship Lines v The King* (1952) Appeal Cases 192 at 208. In *Alderslade v Hendon Laundry* (1945) King's Bench 189 (Court of Appeal), the court had held that a clause excluding liability for loss or damages would cover liability in negligence since the defendant's only duty was to avoid negligence; *Lamport and Holt Lines v Coubro and Scrutton* (1982) 2 Lloyd's List Law Reports 42 (Court of Appeal); *Dorset County Council v Southern Felt Roofing* (1989) 48 Building Law Reports 96 (Court of Appeal); *E.E. Caledonia Ltd. v Orbit Valve Co.* (1994) 1 Weekly Law Reports 1515 (Court of Appeal); *Comyn Ching v Oriental tube* (1979) 17 Building Law Reports 47 at 88 (Court of Appeal).

780 James, 2002, p. 20; May, 1995, p. 68; Wallace, 1995, no. 1.238; Section 2(2) and (11)4 UCTA.

781 1977 c. 50. The UCTA is a British Act of Parliament, which regulates contracts by restricting the operation and legality of some contract terms. It contains several possibilities to limit architect liability.

782 See McKendrick, 2005, pp. 461-484; James, 2002, p. 20.

a contract party to rely on terms to exclude or limit his liability.[783] What is most important about the UCTA is the reasonableness test that applies to all contractual clauses limiting liability. The UCTA requires an exclusion clause to satisfy the requirement of reasonableness.[784] So, clauses limiting liability for loss or damage resulting from negligence have to be fair and reasonable.[785]

The leading case on this issue is *Photo Production v Securicor Transport*.[786] In addition to the reasonableness test, in this case it was established that if contracting parties have equal bargaining power and if risks are normally borne by insurers, the parties should be left the risks as they think fit.[787] And in *Smith v Eric S. Bush*[788], limitation of liability up to the reasonably insurance cover was considered to be a reasonable exclusion clause.

Finally, judges should pay specific attention to the financial resources available and the possible insurance cover, for the purpose of meeting liability.[789] Therefore, it seems that the contracting party who has most financial sources is the superior risk bearer. This will be further examined in Chapters 13 and 14.

6.4 Limitation of Personal Liability

In 2000, the Limited Liability Partnership Act[790] created a new form of legal entity, limited liability partnership, because it was argued that a general increase in professional negligence claims and in the size of those claims needed to be repaired.[791] As a result, English architects are allowed to limit their liability by performing their professional activities in a private company with limited liability.

Moreover, the RIBA Code of Professional Conduct does not prohibit a member from performing his activities in a private company with limited

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783 Furst and Ramsey, 2006, no. 3-080.

784 Furst and Ramsey, 2006, no. 3-080.

785 Sections 2(2) and 11(2) UCTA. This reasonableness-test further applies to limitations of liability for misrepresentation, limitations of any breach of contract, contract terms permitting a business party to render a contractual performance substantially different from that which was reasonably expected of him or to render no performance at all, and limitations on seller's or owner's obligations under the Sale of Goods and Supply of Goods and Services legislation.

786 *Photo Production v Securicor Transport* (1980) Appeal Cases 827 (House of Lords); Furst and Ramsey, 2006, no. 3-078; Wallace, 1995, no. 1.232.

787 This seems to be based on commercial considerations.

788 (1988) Queen's Bench 743.

789 This rule especially aims at the protection of small business companies, as was an issue in *St Albans City and District Council v International Computers Ltd* (1996) 4 All English Reports 481.

790 2000 C. 12

791 James, 2002, p. 229; Uff, 2005, pp. 132, 134-135.

liability.[792] However, this limitation largely depends on the company they are working in. If a sole trader[793], architects are fully liable. If a limited company, architect's liability is limited by company law. If a partnership[794], each partner is jointly and separately liable, which means that clients may pursue each partner individually for damages.

7. Summary

The general liability periods that have been established in the national civil codes or laws quite differ in the five countries that were examined in this Chapter; from 3 years in Germany to 30 years in France. In most countries, more specific rules have been established that apply to architects and shorten the general liability periods. This is described in detail in the scheme on page 145.

Can these liability periods be contractually limited by contracting parties then? In Belgium and France, such exclusion clauses in principle are allowed. However, these clauses are not allowed if they try to limit the ten-year liability period for damages that flow from Article 1792 (severe damages to the building itself that affect the solidity of the works). This is because this ten-year liability period has been established for public order interests and any limitations of this period would interfere with that consideration. In the Netherlands, on the other hand, these exclusion clauses often occur in the commonly applied standard conditions. Accordingly, in the Netherlands a five-year liability period applies to architects. In Germany, clauses limiting the liability period that applies to architects are allowed as well. Often these are included in *Einheitsverträgen* or *vorformulierten Verträgen*. In England, architects are not allowed to limit the liability periods that apply to them on behalf of the Limitation Act 1980 and the Latent Damages Act 1986.

In this Chapter, I have also examined whether or not architects are allowed to limit the *extent* of their liability towards the client. Both in the Netherlands and in England it is common to apply such clauses for architects as they often occur in standard conditions. In Germany, the BGB allows architects to apply *Individualvereinbarungen* but many restrictions as to the application of these clauses have been formulated in the BGB as well. In Belgium and France, clauses that limit the extent of the architect's liability are not commonly applied because there are no standard conditions. Moreover, in Belgium, such clauses are not allowed because of Article 4 *Architectenwet* that establishes the obligatory intervention of architects for

792 Furst and Ramsey, 2006, no. 13-011.
793 Also called a one man business.
794 Also called corporation.

design activities of the client. It would be contradictory to allow clauses that limit the extent of the architect's liability then. In case law, however, for certain activities such clauses were allowed, unless if they try to limit the extent of the architect's liability for damages that flow from Article 1792 *Belgisch Burgerlijk Wetboek*. In France, a similar rule has been established: individual contract terms may be allowed unless they try to limit the liability of architects for damages that flow from Article 1792 *Code Civil*.

As has been shown, in all countries that were examined, architects are nowadays allowed to perform their professional activities in a private company with limited liability. As a result, they are not personally liable towards the client. In Belgium, this rule has only been recently established as a result of a research report (CEA Belgium) that was published in 2004 and according to which Belgian architects appeared outsiders in Europe at this point.

(figure: page 141)

Limitation of Architect Liability

Country Limitation Liability	Legal Liability Period	Contractual Limitation Liability Period	Contractual Limitation Liability Extent	Limitation Personal Liability
England	- 6-year primary limit. period - 15-year final limitation period	Not allowed	Common in standard cond.: requirements in common law & UCTA	Yes
Germany	- 2, 3, or 5 years - 3 years for intentional faults	Allowed. See BGB. Often vorformuliert or ein-heitsarchitektenvertrag (AVA)	Individualverein-barung in BGB. Several exclusions in BGB however	Yes
France	- 30 years - after acceptance: 10 years for damage to solidity or essential elements 2 years for dissociable elements 1 year for entrepreneurs	Not allowed for 10-year liability period because of public order. Other liability periods not allowed to be limited either	Not common because no standard cond. Individual contract Terms are allowed but not if they limit 1792-damages (public order)	Yes
Belgium	- 10 years - after acceptance: 10 years for damage to solidity or essential elements	Only allowed if 1792-damages not limited (public order)	Not allowed (Art. 4 Archwet). For certain design activ. allowed unless 1792-damages	Yes
Netherlands	- 20 years - 5 years on behalf of standard conditions	Common because of standard conditions: 5 -year period	Common in standard conditions: fee and direct damage	Yes

CHAPTER 12 Professional Liability Insurance

1. Introduction

In this chapter, the regulations on professional liability insurance that may apply to architects will be investigated. This is the fourth and final regulation issue of this study. In some Member States, architects have a (legal) obligation to take out professional liability insurance. This obligation has been established in order to provide clients with a financial guarantee that their future damages will be compensated. In other Member States, however, architects are free to determine whether or not they take out professional liability insurance.

In particular, I will explain whether architects in the five European countries that are examined in this study have an obligation to take out insurance for their professional liability. If yes, what were the reasons for establishing such obligation, what is its (legal) basis, and which types of insurance are commonly taken out by architects? If not, are architects sufficiently insured for their professional liability towards the client then? In this respect, I will also investigate whether building contractors in these countries are under an obligation to take out professional liability insurance as well. As we will see in Chapter 14 of this study, this knowledge is relevant for the law and economic analysis that will be carried out in that Chapter.[795]

Finally, in Section 7 of this Chapter, relevant rules on this regulation issue that emanate from the Bolkestein Directive will be explained. After all, the Bolkestein Directive also provides rules on professional liability insurance of service providers such as architects and it is interesting to see whether the national rules of the Member States that will be examined comply with the rules from this Directive.

2. The Netherlands

When the *Wet op de Architectentitel* was modified, it was argued that registered architects should be legally obliged to take out professional liability insurance.[796] However, Dutch architects are still free to determine whether or not they want to take out professional liability insurance.[797]

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795 See Chapter 15, Section 5.

796 Architect's Register, Annual Report 2004, *Den Haag*, May 2005, p. 5.

797 Professional indemnity or a code of conduct has been proposed in order to strengthen the position of architects; *BladNA*, no. 1/2, 2006, p. 20; *BladNA*, no. 10, 2006, p. 13.

Nevertheless, most Dutch architects are covered by liability insurance for two reasons.

Firstly, according to Article 6 Section 2 BNA Statutes, architects who are members of the BNA have the obligation to take out sufficient professional liability insurance. This obligation has been established on behalf of law of association. In the BNA *raampolis* (framework policy), several provisions that may be used for this professional liability insurance have been established by the ONRI[798], BNA, and insurance companies. However, this obligation to take out professional liability insurance does not imply that most Dutch architects are insured against liability claims from clients. Figures of the SBA[799] show that only a third of all Dutch architects is a member of the BNA.[800] For the most part, these are large-scale architect firms that realise 80 % of the annual sales of Dutch architects. As a result, only these large-scale architects will have taken out professional liability insurance by means of a BNA-membership.

Secondly, often standard conditions apply to Dutch design contracts. Generally, these standard conditions include clauses that require architects to insure their professional liability.[801] For example, Article 11 Section 3 SR 1997 and DNR 2005[802], and Article 16 *Standaard Voorwaarden van ProRail voor opdrachten aan Ingenieursbureaus* 2005 (ProRail General Conditions for Services to Engineering Agencies, SVI 2005)[803] contain such obligation. As standard conditions commonly apply to design contracts, most Dutch architects are covered by liability insurance.

Dutch building contractors are obliged to take out professional liability insurance as well if the *Uniforme Administratieve Voorwaarden voor de uitvoering van werken* 1989 (Uniform Administrative Provisions on the

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798 *Organisatie van Nederlandse Raadgevende Ingenieursbureaus* (Dutch Organisation of Consulting Engineers).

799 *Stichting Bureau Architectenregister*; see Chapter 3.

800 There may be several reasons for this low membership percentage of architects. Membership may be too expensive for architects, because the costs do not balance the benefits. Architects may have the opinion that registration at the SBA makes membership of the BNA superfluous. Furthermore, foreign architects who are registered at the SBA (which is an obligation for them as well) but who do not take up residence in the Netherlands may not be willing to join the BNA. Architects may also be averse to all kind of membership duties.

801 This also applies to Swedish and Spanish architects, who generally take a civil liability insurance contract to compensate for future damages; PEL/*Barendrecht/Jansen/Loos/Pinna/Cascão/Van Gulijk*, SC, p. 686. Mandatory insurance may influence the architect's possibilities to invoke limitation clauses. The circumstance that insurance companies often compensate the damages should be taken into account regarding the issue whether exclusion clauses are unacceptable according to reasonableness and fairness criteria (HR 18 June 2004 *Nederlandse Jurisprudentie* 2004, 585).

802 See also Bruggeman, 2007, p. 46.

803 Draft 1.1, Code RIB 0048, p. 17. Author's translation.

realisation of works, UAV 1989) apply.[804] And in the *Uniforme Administratieve Voorwaarden voor Geïntegreerde Contractvormen* (Uniform Administrative Provisions on Integrated Contracts 2005, UAV-GC) a similar obligation for building contractors has been established in § 39-1.[805]

The most important insurance taken out by Dutch architects is the *Beroepsaansprakelijkheidsverzekering* (Professional Liability Insurance[806], BAV). This insurance generally applies to professionals such as engineers, lawyers, notaries, and real estate agents. It covers financial losses towards clients and third parties during five years after acceptance of the works, which is the regular liability period of architects on behalf of standard conditions. Often, the BAV insurance cover is limited to a maximum payment.[807]

In addition to the BAV, clients and building contractors often take out Contractors All Risk (CAR)[808] insurance.[809] CAR insurance covers the risks on damages of all construction participants (including architects) in one insurance policy. Most large-scale companies even apply their own CAR policy to all contracts. CAR insurance mainly covers material damage arising at the construction site, such as liability arising during the realisation of the works or damage to the owner's properties.[810] Contrary to the BAV insurance, CAR insurance is often taken out for a specific project. Therefore, CAR insurance usually ends at the acceptance of the works.[811] Loss that has already been covered by CAR insurance will not be covered by BAV insurance, BAV and CAR policies complement each other well.

Recently, a new type of insurance has been established: the *Verborgen Gebreken Verzekering* (Hidden Defects Insurance[812], VGV).[813] This insurance

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804 Article 43b.1 UAV 1989.

805 It is not very clear, however, how farreaching this obligation of building contractors to take out professional liability insurance is. See Van den Berg, Van der Beek, and Chao-Duivis, 2004, Sections 39-1 and 43b.

806 Author's translation.

807 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 447.

808 Also Construction All Risk; *Toelichting op de rechtsverhouding opdrachtgever - architect, ingenieur en adviseur* DNR 2005 (The Explanation of the Relation Client – Architect, Engineer, and Consultant The New Regulations 2005), p. 57.

809 According to Article 14 Section 8 DNR, this is supported because architects are only liable for damages that are not covered by the common CAR insurance or other similar insurances.

810 Chao-Duivis, 2005, p. 118.

811 Van den Berg, Bregman, and Chao-Duivis (*et al*), 2007, p. 446; Bruggeman, 2007, p. 51. Often contracting parties also take out insurance for a period of two years after the acceptance of the works.

812 Author's translation.

813 Dutch insurance brokers also recently launched a new insurance for design- and build failures that applies to real estate developers. So far, real estate developers could only claim damages up to the construction sum. But in case of large building projects, actual damage often exceeds the construction sum. As a result, clients had to deal with them. This new insurance covers the difference between this limited amount and the actual damage, with a maximum of € 15 000 000. The insurance covers ten years instead of five

aims at providing the client with more certainty about the service performance of building contractors. In particular, this insurance covers the client's damages as a result of hidden defects that occur after the completion of the works.[814] It is beyond the reach of this study to extensively explain the conditions of this insurance. I therefore refer to Van den Berg and Overtoom (2006) who detailedly discussed the VGV. However, it is interesting to see that this insurance focuses on the risks that are involved with construction projects. By mapping these risks by means of an independent agency[815] hired by the client, it can be examined whether the project is insurable. This agency frequently checks the project at particularly difficult or riskful stages in the design and building activities. These examinations are meant to stimulate the prevention of risks, which should result in improving quality of the works, from which both the client and the building contractor benefit. Furthermore, insurance companies also benefit because they can expect decreasing cost of failures, their risks seem to be controlled, and they benefit from quality and risk management by the TIS. Although this VGV has been established considering building contractors and clients, it seems an interesting way of risk analysis.

3. Belgium

Contrary to Dutch architects, Belgian architects are obliged to take out professional liability insurance, which covers their professional and ten-year liability. This obligation has been established in Article 15 of the *Reglement van de Nationale Raad van de Orde der Architecten op de Beroepsplichten van Architecten* (*Reglement van Beroepsplichten*).[816] As of 2007, this obligation is not just a deontological obligation but a legal obligation and has also been established in Article 4 *Laruelle Wet*.[817] This means that instead of an obligation that has been established by the professional organisation of architects, this obligation has now been established by the legislator. The performance of design activities by architects who are not covered by insurance is strictly forbidden. As architects are liable towards the client during ten years after acceptance of the works, the professional liability insurance must be effective for a ten-year period as well.[818] This obligation

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years, which usually applies in standard conditions. See for instance AON, http://www.aon.com/nl/nl/prod/construction/verborgen_gebreken.jsp (accessed on 17 April 2007); Cobouw, 25 October 2006, http://www.ibr.nl/ActualiteitenBR/ShowItem.asp?id-1482 (accessed on 3 November 2006).

814 Van den Berg and Overtoom, 2006, p. 420ff.

815 *Technische Inspectiedienst* (Technical Inspection Service, TIS).

816 29 April 1983, *Belgisch Staatsblad* 8 May 1985.

817 See also *Orde van Architecten België*, newsletter January/February 2006, p.1; Burssens *(et al)*, 2007, pp. 26, 33, 64.

818 Article 15 *Reglement van Beroepsplichten.*

has been established as counterpart of the severe ten-year liability regime[819] that applies to architects.

Therefore, according to Article 3 of the *Aanbeveling van de Nationale Raad van de Orde van Architecten van 11 oktober 1985 inzake de inwerkingtreding van art. 15 van het Reglement van Beroepsplichten (verplichte verzekering)* (Recommendation on the coming into force of Article 15 of the Professional Duties Regulations[820])[821], contractual liability before acceptance, the ten-year liability period after acceptance, and the quasi-delictual liability have to be covered.[822] According to Article 4.1 '*iedere gebeurtenis of reeks van gebeurtenissen, voortvloeiend uit een zelfde oorzaak of die een zelfde oorsprong heeft en die schade veroorzaakt in hoofde van een of meerdere natuurlijke of rechtspersonen'* (each event or series of events that arises out of similar causes or has similar sources and causes damages for one or more natural persons or legal entities) has to be covered. All events causing damages that occur during the course of the insurance contract have to be met.[823]

Accordingly, the professional liability insurance of architects has an extensive scope. However, in Article 8 of the *Aanbeveling Verplichte Verzekering*, limitations have been established. For example, exclusions regarding damage due to gross negligence and deceit are not allowed. Furthermore, loss as a result of exceeding contractual deadlines, liability for entire non-performance of the design contract, and liability for the breach of contractual agreements such as the price and technical issues (for instance about construction methods and materials) have been excluded from insurance cover.

Although the architect's obligation to take out liability insurance may be part of an overall insurance of all construction participants, only architects are required to do so.[824] Therefore, the *Orde van Architecten* fought this inequality at the *Grondwettelijk Hof* (Constitutional Court). The Order argued that building contractors and other construction participants should have a similar duty.[825] Recently[826], this *Grondwettelijk Hof* has acknowledged that the current Belgian situation on construction insurance discriminates against Belgian architects. The court urges the legislator to expand the legal

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819 See Chapter 4, Section 3.

820 Hereafter *Aanbeveling Verplichte Verzekering*.

821 This deontological rule has been established by the *Orde van Architecten België* and provides for minimum requirements for architects to comply with on their obligation to take out liability insurance regarding Article 15 *Reglement van Beroepsplichten.* Burssens, 2001, no. 481.

822 Burssens, 2001, no. 482.

823 Article 5.1.

824 Article 15 *Reglement van Beroepsplichten*; Burssens, 2001, no. 481; Deketelaere, Schoups, and Verbeke, 2004, no. V.75. *Centre d'études d'assurances*, 2004.

825 Http://www.ordredesarchitectes.be/nl/news/verplichte_verzekering.htm (accessed on 7 July 2008).

826 *Grondwettelijk Hof*, 12 July 2007, 100/2007, no. 4059.

obligation to take out liability insurance to all Belgian building participants so that other building participants than architects (building contractors for instance) can bear the liability claims from clients as well. After all, the services of these building participants are so much connected that it is often difficult to determine which party is liable and to what extent towards the client. As a result, often, more than one contract party is liable *in solidum* and has to pay for the damages. Now that Belgian architects are under a legal obligation to insure their professional liability, they face more liability claims than the other building participants as they have deeper pockets.[827]

There are three types of insurance that normally apply to Belgian architects. Firstly, the *beroepsaansprakelijkheidsverzekering* (professional liability insurance) applies to all liberal professions such as architects. It resembles the Dutch BAV and covers damage due to the non-performance of the design assignment by architects. Building contractors can also take out this BAV insurance. In specific, *uitvoerings- en conceptiefouten* (errors in realisation and concept) are covered during the performance of the works until ten years after the acceptance.[828] So, this insurance adequately covers the ten-year liability period of architects.

Secondly, the *Verzekering Alle-Bouwplaats-Risico's* (Construction site Risks Insurance[829], ABR)[830] may apply. This insurance covers damage that occurs during the realisation of the building works.[831] Usually, it is taken out for a period of one or two years.[832] Two insurance periods may be distinguished. Firstly, the insurance regarding the actual construction normally comes to an end at the acceptance of the works. Secondly, at this reception of the works often insurance cover is taken to cover defects that were hidden at the time of acceptance.

The ABR insurance does not cover the ten-year liability period, however. Therefore, it is often taken out together with the *beroepsaansprakelijkheids-verzekering*.[833] Although all construction parties are allowed to take out ABR insurance, often clients use it in order to cover their own losses as well as losses of building contractors and architects.[834] The ABR covers damage due to defaults of architects in design, estimation, and supervision.[835]

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827 *Grondwettelijk Hof*, 12 July 2007, 100/2007, no. 4059; http://www.ordevanarchitecten.be/ (accessed on 7 July 2008). See Chapter 15, Section 5 for more literature on this matter.

828 Design faults that result in immaterial damages and damages resulting from calculation mistakes are covered as well. Deketelaere, Schoups, and Verbeke, 2004, no. XII. 46.

829 Author's translation.

830 Or *All-risks Bouwplaats-Verzekering*.

831 Burssens, 2001, no. 490.

832 Deketelaere, Schoups, and Verbeke, 2004, nos. XII. 22.

833 Deketelaere, Schoups, and Verbeke, 2004, nos. XII. 42-XII.45.

834 Burssens, 2001, no. 491.

835 Deketelaere, Schoups, and Verbeke, 2004, nos. XII. 2-XII-10.

Thirdly, the *Verzekering tienjarige aansprakelijkheid* (Ten-year Liability Insurance[836]) covers the ten-year liability towards clients resulting from Articles 1792 and 2270 *Belgisch Burgerlijk Wetboek*.[837] An important requirement of this insurance is that an external institute examines the (realisation of the) building works before the insurance will be accepted.[838] This insurance can be taken out by clients and building contractors. After all, architects are sufficiently insured for their ten-year liability by way of their professional indemnity insurance. Clients often take this insurance in order to make sure that their future damages will be compensated without fighting liability or the risk of insolvability of one of the contracting parties.[839]

4. France

As Belgian architects, French architects also have a legal obligation to take out professional liability insurance.[840] Specific rules on this obligation have been established in the *Code des Assurances* (Insurance Regulations[841]).[842] Regarding Article L241-1, the person or entity whose professional liability may be established on behalf of Article 1792ff *Code Civile* has to be covered by insurance.

Accordingly, the obligation to take out professional liability insurance applies to *constructeurs*, which refers to architects, building contractors, and consulting engineers and is different from Belgian law. This obligation has been given effect in Article L242-1, which was added after the Spinetta Law[843]. This law has reformed the applicable insurance system. It created an insurance policy called *assurance dommages-ouvrage* (liability insurance for

836 Or *Controleverzekering*.

837 Burssens, 2001, no. 498; Deketelaere, Schoups, and Verbeke, 2004, nos. XII. 33 and 36.

838 This is not a requirement of the *F-10 Verzekering Tienjarige Aansprakelijkheid van Architecten en Aannemers* (F-10 Insurance on the Ten-year Liability of Architects and Building Contractors). This insurance may as well cover Belgian architect liability during ten years, but it only applies to building works of minor extent (such as houses, apartments, or small offices).

839 Burssens, 2001, no. 499.

840 Article 16 *Loi sur l'architecture* 1977; "*tout architecte, personne physique ou morale, dont la responsabilité peut être engagée en raison des actes qu'il accomplit a titre professionnel ou des actes de ses préposes doit être couvert par une assurance"* (architects, performing as legal entities or not, whose liability may be brought in action due to performances on professional title or performances of their employees, have to take out insurance); Darnet, Depuy, and Gendre, 2005, p. 23.

841 Author's translation,

842 The *Code des Assurances* has not been established by the *Ordre des Architects* but by the government.

843 *Loi relative à la responsabilité et à l'assurance dans le domaine de la construction no. 87-12 du 4 janvier 1978.*

damages to the works), which is a legal obligation for *constructeurs* to take out adequate liability insurance.[844]

The liability insurance cover usually starts at the beginning of the works and covers loss for a period of ten years after the reception of the works. It covers damage to the solidity of the (essential elements of the) works, the suitability of the works taking into account the client's desired result, and any loss resulting from the architect's (or building contractor's) deficiencies. The insurance cover is mostly limited to the total construction sum. However, the actual damage can be far greater than the damage that is covered by insurance. As a result, clients may have to pay for these damages themselves.

However, the *assurance dommages-ouvrage* is not required if three cumulative requisites have been met.[845] Firstly, the client is a natural person with a large-scale company.[846] Secondly, the works are performed for the account of this client. Thirdly, the works do not have the purpose of habitation. If these requirements are met, architects are not obliged to take out *assurance dommages-ouvrage*. It seems that this rule has been established because large-scale clients are considered to be the cheapest cost-bearers.

Two types of insurances are frequently taken out by French architects. Firstly, the *Police Unique de Chantier* (Construction Site Policy, PUC), which covers the client's damage during the works as well as the ten-year liability period of architects after acceptance of the works. Clients also often take out this insurance for their own interest and for the interests of other construction participants.

Secondly, the *Tous Risques Chantier* (Construction All Risk, TRC) is often taken out. This is an overall insurance for the damage that occurs at the building site. This insurance may be compared to the Dutch CAR insurance and the Belgian ABR insurance.[847] However, this insurance does not cover the architect's ten-year liability period after acceptance of the works.

Accordingly, the insurance cover only includes the architect's damage on behalf of Articles 1792ff *Code Civil*, *la garantie décennale*. This means that the damage for which architects are liable on behalf of *la garantie de parfait achèvement* and *la garantie biennale de bon fonctionnement* are not covered by the professional liability insurance of architects. So, the architect's obligation to take out liability insurance merely covers damage of certain severity; damage that affects the building's solidity or renders the building unfit for purpose.[848] As a result, not all possible damage is covered by the architect's obligation to take out professional liability insurance.

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844 See Huet, 2004, p. 222; Article L 241-1 *Code des assurances*.

845 Auby and Périnet-Marquet, 1992, no. 1439.

846 Such large-scale company includes companies with more than 500 employees.

847 Http://www.bienconstruire.com (accessed on 15 March 2005).

848 Huet, 2004, pp. 226-227.

5. Germany

As in the Netherlands, German law does not impose an obligation on architects to take out professional liability insurance.[849] However, most German architects are covered by liability insurance.[850] Primarily, this is because German architects are obliged to be registered at the BAK in order to be able to employ the title of architect.[851] One of the requirements prior to this registration is that architects have taken out *Berufshaftpflichtversicherung* (professional liability insurance), which has been described in the *Bestimmungen der Versicherungsvertragsgesetzes* (Regulations on Insurance Contracts Legislation, VVG).[852] This professional liability insurance should cover material damage, physical damage, and other financial losses.[853] German building contractors are not obliged to take out *Berufshaftpflichtversicherung*, however.

In the *Allgemeinen Versicherungsbedingungen für die Haftpflichtversicherung* (General Insurance Regulations on Liability Insurance, AHB)[854], general rules on liability insurance have been established. According to these rules, architect liability towards the client emanating from the *Werkvertrag* or *positiver Vertragsverletzung* (breach of contract) during the works is covered by professional liability insurance.[855] More specific conditions for architects have been established in the *Besonderen Bedingungen und Risikobeschreibungen von Architekten, Bauingenieuren und Beratenden Ingenieuren* (Special Conditions and Risk Descriptions of Architects, Constructional Engineers, and Consulting Engineers, BBR).[856]

According to Section A I 1 BBR, architects have to take out professional liability insurance for the legal liability period, which is usually 3 or 5 years as we have seen in Chapter 11. During this period, damage as a result of the architect's *Verstössen* (breach) is insured. The BBR contains several exclusion

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849 Only in some of the federal states such obligation exists; *Centre d'études d'assurances*, 2004.

850 Niestrate, 2001, no. 482.

851 Thode/Wirth/Kuffer, 2004, p. 2, no. 1.

852 Sections 149-158k. Thode/Wirth/Kuffer, 2004, p. 924, no. 2.

853 Thode/Wirth/Kuffer, 2004, p. 43, no. 110. Furthermore, in the *Architektenvertrag* (under Section 9), an obligation of German architects to take out liability insurance for the length of time of the design contract has been established as well.

854 These are *Allgemeine Geschäftsbedingungen,* which may be compared to standard conditions. They apply when this was explicitly agreed on in the insurance contract. See Thode/Wirth/Kuffer, 2004, p. 924, no. 3.

855 Niestrate, 2002, no. 484; § 1 under 1 AHB; Thode/Wirth/Kuffer, 2004, p. 932, nos. 23-24. In general see, for example, Krüger, 2007.

856 Author's translations. Bindthard/Jagenburg, 1981, nos. 11f; Niestrate, 2002, no. 482; Löffelmann/Fleischmann, 2007, nos. 2119f; Thode/Wirth/Kuffer, 2004, pp. 924-925, nos. 1- 4, p. 949, nos. 70-71. The BBR have priority over the AHB. The last version of the BBR dates from 2001. However, this version closely resembles the 1998 version.

clauses. For example, damage caused by excess of time or costs, and damage following from breach of patent law or copyright are not covered.[857] The insured amount is often limited. As the insurance covers personal injury damages and financial damages, generally a maximum of € 1 000 000 for personal damages or € 150 000 for other damages (such as damages to properties) is observed. As a rule of thumb, 20 to 30 % of the construction sum is the maximum compensation for damages to properties.[858]

6. England

Although English architects are not legally required to take out professional liability insurance[859], insurance contracts are frequently concluded.[860] This is because English architects have to register their name and title at the ARB and for this registration it is required that they are sufficiently insured for their professional liability. This means that all practising registered architects are covered by professional liability insurance.[861] This is a similar rule as the one that applies to German architects.

Furthermore, since 2002, all architects that are members of the RIBA (which is not a legal requirement for English architects), have to commit to the RIBA Code of Professional Conduct.[862] This resembles the Dutch regulations of the BNA regarding the professional liability insurance of architects. According to the RIBA Code of Professional Conduct, holding appropriate insurance cover is a requirement of the RIBA Registered Practice.[863] The Code provides rules on the architect's professional

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857 Niestrate, 2002, nos. 523-531.

858 Niestrate, 2002, no. 557.

859 Http://www.acenet.co.uk; http://www.acenet.co.uk/index.cfm?fuseaction=news&item=173 (accessed on 30 June 2008). In 2004, ACE called on the government to promote a bill to change the law on joint and several liability in the construction industry in order to solve the problem of the increasing costs of professional indemnity insurance in the industry. An increase of 300 % of insurance premiums for their members was shown. It was argued that "The current system of joint and several liability discriminates against firms, irrespective of blame, making them responsible for the failings of other parties over which they have no control." It was suggested to replace the current system by proportionate liability. See also Jones, 2007. According to Jones, the Law Commission has suggested to require compulsory insurance to be taken on by the construction parties. To compare with Dutch law on this topic see for instance Chao-Duivis, 2008.

860 There are two different types of insurance in English contract law. First, indemnity insurance involves compensation for losses that the insured party may suffer in certain events, such as fire, motor, and third party liability insurance. Second, non-indemnity insurance provides for payment of a specified sum on the happening of some event, such as life and personal accident insurances. See Uff, 2005, pp. 227f for more on this distinction.

861 Code of Professional Conduct, Guidance Note 5, Articles 5.1 and 5.2.

862 January 2005; http://www.riba.org (accessed on 29 September 2005).

863 Code of Professional Conduct, Guidance Note 5, Article 5.1.

insurance[864] and on the limitations of the insurance cover. Clauses that limit the insurance cover should be individually negotiated between clients and architects.

According to the RIBA and ARB requirements, English architects have to be covered by liability insurance during six years.[865] Recently, the RIBA Insurance Agency has developed custom-made policies for RIBA members to meet this insurance requirement.[866] As we have seen in Chapter 11, liability claims founded on the legal assignment between architects and clients should be brought within six years from the moment when the breach of contract occurs, not when actual damage is suffered.[867] So, the mandatory insurance period corresponds with the legal liability period.

Usually, architects take out professional liability insurance including continuing annual policies that cover architects against liability arising from negligence.[868] The main objective of this type of insurance is professional negligence in design, for example because architects have not provided a design that is in line with the state of the art.[869] The insurance cover may also include liability for negligence while supervising the works, but it usually focuses on negligence in design issues. It is important that the insurance cover continues after completion of the project. Since the great majority of negligence cases are likely to be made at a considerably later date (latent defects, see Chapter 11), the architect's professional liability insurance cover often is the major insurance available.[870]

English building contractors are often insured as well. This is because individual construction contracts (between clients and building contractors) regularly set express requirements for insurance. In the JCT Conditions of Contract[871] and the ICE Conditions of Contract[872] such an obligation has been established as well. English building contractors often take out CAR insurance, which offers comprehensive insurance in one policy to all the

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864 Code of Professional Conduct, Guidance Note 5.

865 RIBA, Code of Professional Conduct, Guidance Note.

866 RIBA, RIBA Insurance Agency launches new professional indemnity service for architect, 10 February 2005; http://www.riba.org, (accessed on 29 September 2005).

867 Section 5 Limitation Act 1980; Uff, 2005, p. 213; James, 2002, p. 249.

868 Uff, 2005, p. 229; See also, for example, Smith, Wilson, and Bundschuh, 2001.

869 See Chapter 4 for more on this state of the art principle. Wallace, 1995, no. 15.031; Uff, 2005, p. 229; *Queensland Railways v Manufacturer's Insurance* (1968), 118 Common Law Reports 314. In *Wimpey Construction (UK) Ltd. v Poole* (1984), 27 Building Law Reports 58 at 78, the effects of liability insurance have been set out; especially the legal twists that may arise from insurance of liability rather than property; *Hitchens v Prudential Assurance* (1991), 60 Building Law Reports 51.

870 Uff, 2005, pp. 228-229; Wallace, 1995, no. 15-034.

871 Clause 22.

872 Clause 21.

various parties to a construction project. Such CAR insurance can also include insurance cover for architects.[873]

7. Bolkestein Directive

The Bolkestein Directive also provides for rules on professional liability insurance of service providers.[874] According to Article 27, Section 1 of the Bolkestein Directive "Member States shall ensure that providers whose services present a direct and particular risk to the health or safety of the recipient or a third person (…) are obliged to subscribe professional indemnity insurance appropriate to the nature and extent of the risk, or to provide any other guarantee which is equivalent or essentially comparable as regards its purpose."

Furthermore, in Recital 63a it has been established that "(…) services which can create a risk for the safety of third parties are for example (…) services in the field of building work including services of architects (…)". However, "(…) it is not necessary that an obligation of appropriate insurance is laid down by law. It is sufficient if an insurance obligation is part of deontological rules laid down by professional bodies (…)".[875]

It seems that Belgian and French architects comply with these requirements as in these countries an obligation of architects to take out professional liability insurance has been established by law. German and English architects also seem to comply with the Bolkestein requirements. These architects are legally obliged to register their name and title at a registration board (BAK or ARB) if they want to carry the title of architect (see Chapter 3). Subsequently, this registration requires them to take out adequate professional liability insurance. In Germany, the basis of this obligation can be found in the VVG. In England, Articles 5.1. en 5.2. of the Code of Professional Conduct oblige architects to take out liability insurance. This is a deontological rule.

Dutch architects, however, are not obliged to take out professional indemnity, unless they are members of the BNA. The Dutch government may have to take into account the European obligation that architects have to be insured for their professional liability. It could be argued that such obligation has to be established in the Architect's Title Act, for example. It should be taken into account that Dutch architects will usually apply standard conditions that require architects to insure their professional liability, though.

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873 Uff, 2005, p. 229; Wallace, 1995, nos. 15-008 – 15-009.

874 See also *BladNA*, no. 4, 2006, p. 21.

875 Recital 63b.

8. Summary

In this Chapter, I explained whether architects are under an obligation to take out professional liability insurance. If yes, I examined the reasons for establishing such obligation, it's (legal) basis, and the types of insurance that are commonly taken out by architects. As shown, in four of the five countries examined, architects have an obligation to take out professional liability insurance. Sometimes this obligation is based on the law, for instance in Belgium and France. Sometimes this obligation follows from the architect's registration of his title at a registration board. In Germany and England, for example, architects are not obliged by law to take out liability insurance but if they want to carry the title of architect and perform design activities under that title, they have to register and thus are required to take out liability insurance.

Only in the Netherlands, architects are not obliged to take out professional liability insurance. However, they are covered by liability insurance for the most part, because of the applicability of standard conditions to the design assignment with the client, however. Moreover, architects who are member of the BNA are required to take out professional liability insurance as well. Nevertheless, Dutch architects seem not to comply with the Bolkestein Directive.

This Chapter furthermore shows that building contractors are often obliged to take out professional liability insurance as well. In the Netherlands and England, such obligation has been established in standard conditions. In France, this is a legal obligation. Belgian and German building contractors, however, are not obliged to take out professional liability insurance. In Belgium, recently the legislator was asked by the *Grondwettelijk Hof* to expand the legal obligation to take out liability insurance to all Belgian building participants such as building contractors.

(figures: page 155)

Obligation of Architects to Take out Professional Liability Insurance

Country Obligation to Take out Insurance	Netherlands	Belgium	France	Germany	England
Legal Obligation	No	Yes	Yes	No	No
By Registration Membership Professional Order	No	No	No	Yes	Yes
In Standard Conditions	Yes	No	No	No	No
By Membership Professional Organisation	Yes	No	No	No	Yes

Obligation of Building Contractors to Take out Professional Liability Insurance

Country Obligation to Take out Insurance	Netherlands	Belgium	France	Germany	England
Legal Obligation	No	No	Yes	No	No
In Standard Conditions	Yes	No	No	No	Yes

CHAPTER 13 Economic Approaches

1. Introduction

In the previous chapters, I have investigated four regulation issues that determine the legal relationship between clients and architects. In particular, the market entry regulations that apply to architects, the applicable liability system, the limitation of architect liability, and the professional liability insurance system that may apply to architects have been examined. As explained, each of these regulation issues has two (or more) regulation options that are most applied by the national rule makers. These options will be evaluated in Chapter 14 using a law and economics perspective.

In this chapter, I will explain why such law and economics perspective will be applied to analyse these regulation options. Furthermore, I will describe several law and economics theories that can be applied and which of these seems the most suitable evaluation perspective to analyse the regulation options. Therefore, I will describe three law and economic perspectives that may be applied to evaluate the costs of the regulation options. These are the Pareto and Kaldor-Hicks efficiency criteria (Section 3), the Coase theorem (Section 4), and Calabresi's cost reduction theory (Section 5). I will argue that the cost reduction of Calabresi is a suitable method to examine *which combination of regulation options on market entry, architect liability, limitation of architect liability, and insurance is optimal in view of the European architect's and client's legitimate interests*.

2. Law and Economics

Basically, law and economics is an economic analysis of legal rules that provides an objective method to choose between the options of the four regulation issues I investigated in this study.[876] Once the comparative study shows two alternative regulation options in separate Member States, legal analysis seems not to provide a method for choosing one of them as the 'best option'. However, economic analysis may help to establish which of these regulation options is likely to lead to more efficient outcomes.[877] Different legal rules lead to different costs and benefits for both parties to a transaction and predicting these costs and benefits may lead to preferring one rule over the other. Economic analysis provides a scientific theory to

876 Barnes and Stout, 1992, pp. 1-2.

877 See Vranken, 2006, nos. 121f about the limitations of multidisciplinary legal research in general.

predict the effects of legal rules on behaviour and on the outcomes for the affected parties, such as architects and clients.[878]

Mainstream law and economics analysis focuses on the rational choice theory, which assumes that people commonly make rational choices.[879] However, there are other law and economics movements that criticise this rational choice theory as a mainstream framework to analyse legal rules, such as Behavioural Law and Economics[880]. For example, it has been argued that law and economics analysis too strongly focuses on the *costs* that are caused by certain legal rules, whereas other aspects that are not financial such as emotions or fairness[881] may also influence legal rules. Furthermore, it may be argued that law and economics analyses only provide a theoretical framework to examine legal rules by predicting their outcome in theory, whereas empirical examinations for instance, may provide starting-points as well. As follows from the research question, I will focus on an *optimal combination* of the regulation options considering the interests of architects and clients. In the Introduction of this study I explained that the notion optimal is described as maximum fulfilment of the architect's and client's interests. Optimal will be considered cost-efficient, as a maximization of the architect's and client's utility.

3. Pareto- and Kaldor-Hicks Efficiency

The Pareto criterion provides an economic approach to establish whether changes in the distribution of goods are desirable.[882] In particular, the Pareto criteria may be applied to examine the efficiency of legal rules, such as the rules that apply on the legal relationship between architects and clients. According to the Pareto criterion common welfare[883] increases if the utility of individuals in a certain group increases (these are called winners) without the utility of other individuals in that group decreasing (these are called losers). For example, if all architects would benefit from certain rules on the

878 See Cooter and Ulen, 2004, pp. 4f.

879 See Cooter and Ulen, 2004, pp. 14-16, 21-30; Ulen, 1999, pp. 793f; de Geest, 1994, p. 442; Teijl and Holzhauer, 1997, p. 65.

880 Visscher, 2006, pp. 4-7; Hesselink, 2004, pp. 13-137; Posner, 1998, pp. 1558-1560.

881 In their book *Fairness versus Welfare* (2002), Kaplow and Shavell argue that legal rules have to be exclusively analysed by the welfare principle and should not depend on notions of fairness for instance; Kaplow and Shavell, 2002, pp. xvii, 3-4. See also Van Bijnen, 2005, pp. 11-13, 28-32.

882 Cooter and Ulen, 2004, pp. 16-17; Samuelsen and Nordhaus, 1998, pp. 148f; Schäfer and Ott, 2004, p. 8.

883 Welfare economics explores how decisions of individuals and firms interact to affect the well-being of a group. It is a policy assessment that depends exclusively on individual's well-being. This well-being refers to the extent in which people's needs are being satisfied. Generally, maximization of welfare is achieved by efficient allocation of means (see for example Barnes and Stout, 1992, pp. 1-2).

professional liability insurance, whereas no clients are put at a disadvantage by these rules, this situation is called a Pareto improvement.

If an economic system is Pareto efficient, it is no longer possible to improve the situation of one individual without deteriorating the situation of another.[884] Obviously, this is the best possible state for society. However, in the real world alternative legal rules involve both winners and losers, whereas Pareto efficiency requires only winners.[885] For example, it seems rather unrealistic to assume that certain rules on market entry would benefit all architects without disadvantaging clients.

The Kaldor-Hicks criterion for efficiency allows for winners and losers. According to the Kaldor-Hicks criterion, a rule is an improvement if the winners win more than the losers lose. So if we look at the rules on the market entry of architects, for example, architects should benefit more from these rules than clients lose. Moreover, the winners (architects) should, in theory, be able to compensate the losers (clients) and still be in a better position than before.[886] In theory, because the Kaldor-Hicks criteria do not require that compensation is actually being paid. The criteria merely imply that the possibility for such compensation exists.[887] This possible compensation is the key difference with the Pareto efficiency criteria.[888]

As a result, it seems that the Kaldor-Hicks theory is much more realistic compared to the Pareto criteria. Therefore, the Kaldor-Hicks criteria are considered the mainstream law and economics approach to establish efficiency.[889] The Kaldor-Hicks criteria may be a suitable approach to evaluate different alternatives. For example, the Kaldor-Hicks criteria may examine which of the options of the four regulation issues of this study provide maximum welfare for both architects and clients.

However, the Kaldor-Hicks framework does not provide tools that precisely indicate what costs and benefits are actually caused by certain legal rules. The Kaldor-Hicks framework only indicates that, while establishing legal rules, the costs and benefits of these legal rules should be taken into consideration. As a result, the Kaldor-Hicks criteria appear not very apt for investigating the specific regulation options that determine the legal relationship between architects and clients. Therefore, in Section 3 and 4 of this chapter, I will describe two law and economic frameworks that focus on the types of costs of legal rules. These two frameworks may better indicate what costs and benefits are caused by the regulation options.

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884 Cooter and Ulen, 2004, pp. 16-17; Posner 2003, pp. 12-13.

885 Velthoven and Wijck, 2001, p. 25; Schäfer and Ott, 2004, p. 28; Van den Bergh, 2000, Section 1, p. 24.

886 Cooter and Ulen, 2004, p. 48; Posner, 2003, pp. 15-16.

887 Cooter and Ulen, 2004, p. 48; Barnes and Stout, 1992, pp. 6f.

888 This is called potential Pareto improvement, potential Pareto superiority, or allocative efficiency; Cooter and Ulen, 2004, p. 48; Posner, 2003, p. 13.

889 Coleman, 2003, pp. 1516-1519.

4. Coase-theorem

Such a focus is provided by the Coase-theorem, which concentrates on transaction costs. These are the costs of achieving and performing market transactions.[890] There are some types of transaction costs that frequently occur such as negotiation costs, monitoring costs, information costs, costs of transport, and cost of communication. In the relationship between architect and client, transaction costs for example include the client's costs of finding an appropriate architect, negotiating with the architect on the design assignment, drawing up a design contract, and bringing a claim before a judge in case of the architect's breach of duty. Ronald Coase was one of the first to stress that transaction costs may impede transactions that would otherwise lead to welfare improvements.

The Coase-theorem assumes that if transaction costs were zero, rational contracting parties would be able to craft a perfect contract leading to optimally efficient outcomes.[891] This is because contracting parties would be able to keep on bargaining and negotiating until both parties have most benefits from the contract. If they do not have to consider the costs of bargaining, negotiating, drafting, and communication, each right, product, or service would end up with the person who values it most.[892] Moreover, each risk is allocated to the party who can bear it at the lowest cost. This party is called the cheapest cost bearer.[893]

However, as has been broadly discussed in literature, a world in which transaction costs are zero is not very realistic. A more realistic goal is to try to establish legal rules that *reduce* transaction costs. As a result, it would be possible to evaluate different legal rules that apply to design contracts by investigating their effects on transaction costs.

However, a problem with this approach is that the concept of transaction costs is rather broad. When analysing different liability rules for instance, it is necessary to look at the costs of preventing the damages, the costs of compensating these damages, and the costs of taking out professional liability insurance. Coase seems to argue that these costs are also covered by the general notion transaction costs. But then again the analysis will be very broad and difficult to apply, because transaction costs may be hidden in many different places. For these reasons, in Section 4 I will examine another

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890 Posner, 2000(b), pp. 16f; Shavell, 2004, p. 280. The notion administrative costs is frequently applied in economic literature as well. Administrative costs are the (non-) legal expenses that contract parties bear when accidents occur. Non-legal expenses for instance include time and effort of the contract parties involved as well as emotional costs.

891 Coase, 1960.

892 Van den Bergh, 2001, p. 111.

893 See Coase, 1960.

economic theory, which focuses on the reduction of the costs of prevention, the costs of damages, the costs of spreading of these damages, and the administrative costs.

5. Calabresi's Cost Reduction Theory

Calabresi has provided a framework for the analysis of the efficiency of the rules of tort law. In particular, he has argued that the most important goal of tort law is to minimize the expected costs of accidents (damages) and the costs of prevention to avoid these accidents.[894] So, usually, Calabresi's cost reduction theory is applied to analyse the efficiency of the rules of tort law. However, it may be argued that the cost reduction framework of Calabresi can also be applied to contract law and thus to analyse the efficiency of contractual agreements such as the legal relationship between architects and clients. After all, as in tort law, when agreeing to a contract, parties such as clients and architects want to reduce future damage, optimally spread risks, and reduce administrative costs. As a result, contracting parties will allocate the risks by determining which contracting party is the best or cheapest party to prevent these risks, or which party is the best or cheapest party to take out liability insurance. Thus, although Calabresi's cost reduction theory is usually applied to tort law, in this study it will be applied to contractual agreements.

Below I will describe the cost reduction theory of Calabresi by explaining the three cost reduction goals he has established; the primary, secondary, and tertiary cost reduction goals.

5.1. Primary Costs: Costs of Prevention and Costs of Damage

According to Calabresi, the principal function of accident law is to reduce the sum of the costs of (avoiding) accidents.[895] However, there is a trade-off because some damage is very costly to prevent. Therefore, Calabresi has argued that the primary cost reduction goal is to minimize the sum of the costs of prevention and the costs of damage.[896] Thus, primary costs include the costs of accidents that are not prevented because preventing them is more costly than letting them occur. Applied to the legal relationship between architect and client, primary costs of a client who suffers from a breach of contract of an architect may be the costs of his financial loss, and his costs of suffering of not achieving his envisaged result. Both the architect and the client may incur costs of the precautionary measures they have

894 Accident law covers the legal rules on the rights of victims of harm to sue and to collect payments from the injurer.

895 Calabresi, 1970, p. 26.

896 Calabresi, 1970, pp. 26-27.

taken. Instead of the term primary costs, which tells little about the nature of the costs, in this study I will apply the notion 'costs of prevention and costs of damage'.

Calabresi and others have distinguished two main approaches to reduce the costs of prevention and the costs of damage. Firstly, these costs may be reduced by taking an adequate level of care. The more prevention has been taken, the lower the level of damages will be. The Learned Hand rule[897] may be applied to achieve the conditions under which an efficient level of care is achieved.[898] This rule enables the injurer to weigh his costs of prevention against the costs of damage for the injured party.

According to the Learned Hand rule, the injurer of the damage is liable for negligence if the prevention costs are less than the expected benefit. Therefore, the injurer has to make prevention costs that at most equal his expected benefit. In the ideal situation, a certain level of care is undertaken so that the prevention costs at least equal the costs of the reduction of damage. As we have seen in the comparative part, often rules have been established that indicate a minimum level of care which should be observed by the architect.[899]

Secondly, primary costs may be reduced by performing a certain level of activity. The higher the level of dangerous activities, the more damage will occur. If the expected utility derived from the activity at least equals the expected damages of the activity, an optimal activity level has been achieved. However, activities may easily cause damages and should therefore be discouraged. For example, these activities may be substituted by safer activities that do not cause damages that easily.[900] This approach is called the general deterrence approach.[901]

Activities can also be made more expensive and thereby less attractive, for example by means of forbidding certain activities through a political process.[902] This is called the specific deterrence approach.[903] The main reason for this approach is that people are said not to know what is best for them. For example, a collective judgment on whether cars of a particular type are desirable is better than a series of individual judgments to buy or not to buy

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897 Schäfer and Ott, 2004, pp. 135-136; Cooter and Ulen, 2004, pp. 331f; Shavell, 2004, p. 191; *United States v Caroll Towing Co.*, 159 *F.*2d 169.

898 Van den Bergh, 2001, p. 116.

899 See Chapter 4.

900 Calabresi, 1970, pp. 26-27.

901 This approach is based on the efficient allocation of resources. Mostly, the free market or price system is given as a solution of this allocation of resources. This is because no one knows what is best for individuals better than they themselves do. However, it is difficult to estimate which activities cause which costs.

902 Calabresi, 1970, pp. 95-96, 107.

903 Calabresi, 1970, pp. 95f.

this car (which would be preferred under the general deterrence approach).[904]

5.2. Secondary Costs: Costs of Spreading the Damage

Rules regarding liability do not only affect the outcomes by giving incentives for prevention. Therefore, Calabresi has also distinguished two other cost reduction goals: the secondary and tertiary cost reduction goals. The secondary cost reduction goal aims at reducing the costs of spreading the damage. These are the costs of a party to spread the damages that are caused to him by the breach of contract of the other party, for example the costs of taking out insurance.[905] Therefore, in this study, I will apply the notion 'costs of spreading the damage' to indicate these secondary costs.

The secondary cost reduction goal only comes into being after earlier measures to prevent or reduce primary accident costs have failed. Regarding the legal relationship between architects and clients, it should be investigated whether architects or clients are better capable to bear the costs of liability. They are considered the cheapest risk bearers. Usually, the damage is placed on the wealthy in order to bring about a just distribution (*richesse oblige*), regardless of whether this involves financial spreading or not. This is because these people will be in the best situation to pay for the damages. Therefore, they are considered the cheapest risk bearers.[906]

Calabresi mentions three variables that may indicate that a party is the superior risk bearer. Firstly, a party is considered the superior risk bearer if he is in the best position to prevent the risk. Secondly, a party is considered to be the superior risk bearer if he can best insure himself. Thirdly, a party is considered the superior risk bearer if he can take out insurance at the lowest costs.[907]

5.3. Tertiary Costs: Administrative Costs

The tertiary cost reduction goal aims at reducing the costs that occur at the treatment of accidents, such as verification costs of insurance companies,

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904 Furthermore, not all activities can be monetized. Accidents may involve costs that cannot be reduced to money, for example lives, pain, and suffering. These costs may not be measured in purely monetary terms according to Calabresi (Calabresi, 1970, pp. 96-97). The specific deterrence approach knows limitations as well. For instance, total political decision-making is impossible. The specific deterrence can achieve primary loss reduction by reaching detailed activities, but it can only be effective for a very limited number of acts or activities. Furthermore, for most activities, this specific deterrence approach would cost society more than it would save; Calabresi, 1970, pp. 107-109, 657.

905 Calabresi, 1970, p. 51.

906 Calabresi, 1970, p. 21.

907 Calabresi, 1970, pp. 27-28.

negotiation costs, lawyer's costs, costs of using the courts, costs of administering punishment, and other administrative costs. Tertiary costs are sometimes also called transaction costs but this notion is then used in a more narrow sense than under the very open-ended transaction costs concept of Coase.

In this study, I will apply the notion 'administrative costs' to indicate tertiary costs. The purpose of this tertiary cost reduction goal is to question whether the attempt to reduce accident costs, either through primary or secondary cost reduction, does not cost more than it actually saves.[908] If the administrative costs of the prevention and compensation of damages exceed the actual prevention and compensation costs, prevention and compensation may not be worthwhile.

6. Summary

In this chapter, I have described three frameworks for the economic analysis of the rules on the relationship of architects and clients. In particular, I have explained the Pareto and Kaldor-Hicks efficiency criteria, the Coase theorem, and the cost reduction theory of Calabresi. In Chapter 15, I will apply the cost reduction theory of Calabresi to examine the options of the four regulation issues that apply to architects and clients. Calabresi has distinguished three types of costs, the costs of prevention and damages (primary costs), the costs of spreading the damages (secondary costs), and the administrative costs (tertiary costs). I have described these three types of costs by means of focussing on the three cost reduction goals Calabresi's has mentioned. Calabresi's cost reduction theory in particular focuses on the reduction of the costs of prevention and the costs of damages. Furthermore, the secondary cost reduction goal focuses on the costs of spreading the damage, for instance by means of private insurance or by means of letting the superior risk bearer bear the costs of damages. Tertiary costs, finally, are the administrative costs that are needed to reach the primary and secondary cost reduction goals.

908 Calabresi, 1970, p. 28.

CHAPTER 14 Cost Reduction Perspective

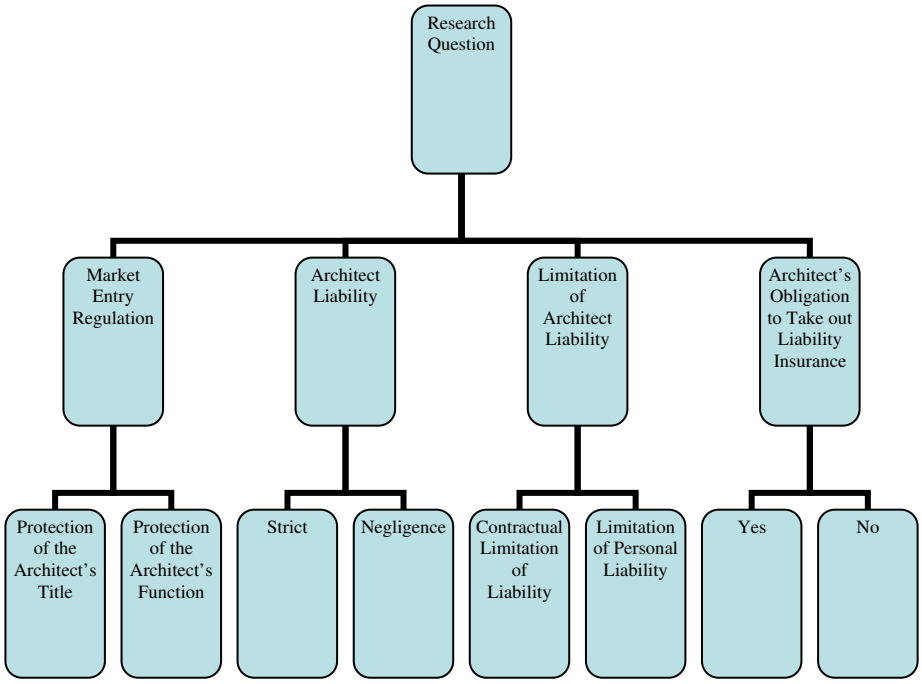
1. Introduction

As has been explained in Chapter 13, I will apply a law and economics perspective to analyse some of the legal rules that apply to the relationship between architects and clients. In particular, these legal rules will be analysed by Calabresi's cost reduction perspective, which has been explained in Chapter 13. The purpose of this cost reduction analysis is to investigate what costs and benefits are likely to be associated with each of the options for the four regulation issues as can be found in the diagram on page 165.

For each of these options, the costs of prevention and damage (primary costs), the costs of spreading the damage (secondary costs), and the administrative costs (tertiary costs) will be examined. This investigation may determine which of the options is preferred from a cost perspective. In doing so, I focussed on the client's and architect's *legitimate interests* (see research question). This means that the interests of clients and architects that have great significance in their contractual relationship will be taken into account. For each of the four regulation issues other interests may be important to clients and architects, however.

To find out which interests have to be taken into account, I established several contacts with architect's organisations (BNA, RIBA, BAK, *Ordre des Architectes*, *Orde van Architecten*, CNOA), architect firms, and clients in the five countries examined. Accordingly, the most important interests seem financial interests (such as design prices), internal and external competition (for instance of building contractors, advisors, or technical engineers), and the quality of designs. These interests are relevant to both architects and clients. Moreover, these interests are frequently applied by national organisations of architects for their policies and reports.[909]

[909] See for instance, *Centre d'études d'assurances*, 2004; Rijksgebouwendienst, 2006; http://www.ordevanarchitecten.be/nl/teksten/hoofdartikels/0412.htm (accessed on 10 January 2005); http://www.ordredesarchitectes.be/nl/teksten/cea/cea.htm (accessed on 28 January 2005); *Ordre des Architectes* (Architect's Order), 2005; *Projet d'architecture* 2007 (http://www.architecture2007.com); RIBA, RIBA Constructive Change: a strategic industry study into the future of the Architect's Profession, December 2005 (http://www.riba.org).



In order to compare the regulation options I will apply a reference point for each regulation issue.[910] This is a regulation modality with which I will compare the regulation options. Usually, I will take a system with no regulation on the issue as a reference point. So, what my analysis will show is whether the option has higher costs or lower costs (benefits) in comparison with the reference model of regulation.

In each section of this Chapter, the options for each of the four regulation issues will be evaluated. Each section will contain two subsections therefore. Each subsection will contain a diagram in which the three categories of costs of this option in comparison with the reference model of regulation will be mentioned. If costs are likely to be higher than in the reference situation this cell in the diagram will be shaded in grey. If costs are lower (benefits), this cell will be white. An empty cell indicates no difference in cost level.

Whether an option has costs or benefits will be analysed on the basis of the law and economics literature. The regulation issues regarding liability and market entry regulation are not unique to the relationship between architects and clients. They have been investigated for relationships between service providers and clients in general and for relationships between persons who cause damage to their victims more in general. What I will do

910 A reference point may be also described as a zero point or an orientation point. People evaluate situations in accordance with their relation to a certain reference point (Sunstein, 2000, p. 4).

in this chapter is apply this well established body of theory to the relationship between architects and clients. I did not measure these costs empirically. Generally, I will also refrain from estimates of the size of the different cost factors. In some instances, however, it will be possible to show that a category of costs is very likely to be large or negligible in comparison with other cost factors.

2. Market Entry Regulation

Market entry regulation is the first of the four regulation issues that have been investigated in this study. It has two options; protection of the architect's title and protection of the architect's function. In this section I will examine which of these options best reduces the costs of prevention and damage, the costs of spreading the damage, and the administrative costs. The reference point that will be applied is the situation in which there are no rules on the regulation of the title or profession of architects. Market entry is then completely free.

In the figure below the most important conclusions from Chapter 3 (where market entry regulation was examined) can be found:

Market Entry Regulation

Country Protection	Netherlands	Belgium	France	Germany	England
Protection of the Title of Architects	Yes	Yes	Yes	Yes	Yes
Protection of the Function of Architects	No	Yes	Yes	No	No

2.1. Protection of the Title of Architects

Costs of Prevention and Damage

As has been examined in Chapter 3, in all the countries that were examined architects have a legal obligation to register their name at national registration boards in order to be allowed to carry the title of an architect. This registration in each country requires architects to have complied with several educational and training requirements. This protection of the title of architects aims at protecting the quality of the profession of architects. Only

architects who have met certain requirements on education and professional training may carry the title of architect and perform design services under that title.[911]

These requirements are usually designed and administered by national professional organisations of architects in order to ensure the professional skill of architects who carry the title of architect.[912] Therefore, the protection of the architect's title ensures that clients are safeguarded from hiring incompetent or insufficiently educated architects. If a client lets a person who does not carry the title of architect design a building, he knows that these guarantees of quality do not apply. Clients who contemplate hiring a service provider for their design activities are stimulated to hire a service provider who carries the title of architect, because it is likely that this architect is sufficiently skilled to perform the design service and will therefore perform designs with sufficient quality.

Thus, title protection reduces the client's likelihood of obtaining a faulty design, and therefore his risk of damage, because clients are led into the direction of a service provider who is sufficiently skilled to perform the design activity.[913] If clients are prepared to run that risk, however, because they have sufficient skills to monitor the design themselves, or because the building for which they need the design does not provide many risks of damages, they can choose for a lower quality service provider.

However, title protection may have its downsides. Education and training is costly. These are the costs of prevention of damages. Moreover, the requirements on education and training architects have to comply with may imply that architects will be biased towards existing methods of design that are suggested by the education and training that have been established by the national professional organisation of architects.[914]

As a result, architects may be less inclined to think out of the box, which then results in less innovation in providing designs. This can be seen as a possible cost factor, and a possible cause of damages, because innovation may result in higher-quality designs. However, it should be taken into account that innovation also entails risks of damages, for example if new materials or construction methods are applied that have not been tried or tested before (see Chapter 6).

On the other hand, if there would be no requirements regarding education and training, the quality of designs may even be lower, because architects would have no minimum education and training standards to

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911 Stephen and Love, 1999, pp. 993, 995; Svorny, 1999, pp. 296f; Friedman and Kuznets, 1945.

912 Stephen and Love, 1999, p. 987.

913 It may be argued that these choices are irrational choices. It is generally believed that people do not always make rational choices. See Chapter 14, Section 2 for more about the rational choice theory.

914 Svorny, 1999, p. 297; Samuelson/Nordhaus, 1998, pp. 160f.

comply with for their design activities. This seems to cause costs of damages for clients also.

Costs of Spreading the Damage

As has been explained in Chapter 13, the secondary cost reduction goal aims at reducing the costs of spreading the damage, for instance, the costs of bearing liability or taking out insurance. Obviously, the secondary cost reduction goal is not related to the protection of the title of architects, because this option does not cause secondary costs.

Administrative Costs

The most important administrative costs caused in a legal system where the title of architects has been protected, are the costs of regulation and maintenance of this market entry requirement. These administrative costs will be borne by the national professional organisations of architects or the government, depending on who has to regulate and maintain these regulations. These professional organisations of architects will pass these administrative costs on to architects by asking high membership rates. Subsequently, these architects will most likely try to compensate for these costs by asking their clients high(er) prices for their services.

(figure: page 169)

2.2. Protection of the Architect's Function

In addition to the protection of the architect's title, in Belgium and France, the function of architects has been protected as well.[915] Accordingly, Belgian and French clients who initiate building activities have a legal obligation to engage an architect for their design activities. In particular, these clients are obliged to hire an architect if their design activities require a building license, which seems to cover most building activities.

In both of these countries, this legal obligation has been established to protect the public safety. As a result, architects have the exclusive right to perform the service of designing in these countries. Clients are not allowed to start building activities without hiring an architect. This results in a professional monopolyof architects.

[915] See Chapter 3.

Cost Reduction of the Protection of the Title of Architects

Architect/Client Cost Reduction Goals	*Architects*	*Clients*
Costs of Prevention and Damage	Architects have prevention costs due to educational and training requirements.	Architects have to comply with education and training requirements → clients are ensured of the design's quality → less costs of damage.
		Clients seem protected against hiring malpracticing or bad quality architects → higher quality of designs seems to reduce costs of damage.
		Due to education and training requirements architects biased towards existing methods of education and training → less innovation → low quality designs → more costs of damage.
Costs of Spreading the Damage	-	-
Administrative Costs	Professional organisations have administrative costs due to regulating and maintaining protection of the title → may be passed on to architects by asking high membership rates.	Architects will ask their clients high prices for their design services to compensate for these high membership rates.

Dutch, German, and English clients on the contrary, are free to determine whether they want to hire an architect for their design activities. In these

countries, the function of architects has not been protected.[916] In this section, I will examine the costs that are caused by the protection of the function of architects.

Costs of Prevention and Damage

Generally, it seems that the protection of the architect's function has been established in order to protect clients[917] from making irrational choices when hiring an architect, or to regulate the prices and profits[918] of design services. As is the case with the protection of the title of architects, the education and training requirements lead to costs that must be taken care off.

The most important difficulty with this market entry regulation seems that architects have less external competition with other (building) professionals who can also provide designs, such as building contractors, compared to countries where the function of architects is not protected. As a result, architects in these systems may have less incentives to distinguish them by means of creating high-quality, innovative, or state of the art designs, compared to the situation in which the function of architects is not protected, because they are guaranteed of future design assignments anyway.[919] However, it should be taken into account that, as a result of the development of new contract forms in construction law (for example design and build contracts) which I referred to in Chapter 1, building contractors or other service providers will more often compete with architects. Anyhow, the protection of the function gives architects a strong position in the construction industry and does not match with the development of these new market models.

It may be argued that this lack of external competition in particular causes costs of damage for clients, because high-quality designs are likely to result in high-quality buildings.[920] Furthermore, the lack of external competition on the design market may imply that architects have fewer incentives to control

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916 Monopoly is one of the four (next to externalities, public goods and asymmetric information) sources of market failures which disturb perfect competition. Generally, a monopolist is a single supplier who alone determines the price of a particular good or service and provides for the total request of the market. The kind of monopoly that seems to apply to Belgian, French, and German architects is a legal monopoly, which often exists in the field of liberal professions such as attorneys, notaries, bailiffs, doctors, and pharmacists. Belgian, French, and German architects are shielded from competition by a legal norm that prohibits outsiders from entering their market. Samuelsen/Nordhaus, 1998, pp. 35, 160-161; Depoorter, 1999; Van den Bergh, 2004, p. 47; Cooter and Ulen, 2004, pp. 16, 43-44, 223f, 286f; Van Velthoven and Van Wijck, 2001, pp. 249f.

917 Van Velthoven and Van Wijck, 2001, p. 264; Stephen and Love, 1999, p. 989.

918 Samuelsen/Nordhaus, 1998, p. 35.

919 See Van den Bergh and Faure, 1991; Arnauld, 1972; Stephen and Love, 1999; Faure 1993.

920 Depoorter, 1999, pp. 502-503; Posner, 1969.

their expenses because they are the price-fixing party.[921] As a result, the costs that clients have to pay for the service of designing are likely to increase. Finally, the protection of the function of architects causes costs because clients are obliged to hire an architect and are not allowed to design themselves or hire the building contractor (whom they already assigned under the building contract) for their design activities. These options may be cheaper or more suitable to the client's needs and wishes and therefore strongly reduce the client's costs.

However, in a system where the function of architects is protected, there is still internal competition possible among architects. This internal competition may stimulate architects to be innovative and creative while performing their design activities, because they may want to distinguish themselves from other architects in order to be assigned by clients. However, this internal competition does not completely solve the problem of upwards pressure on design prices if compared to the situation with no market entry regulation. Architects still do not have to compete with other professionals who may be able to perform design activities more cheaply.

Finally, the protection of the function of architects seems to reduce the costs of damage that may be caused when clients are not sufficiently informed about whether the architect is qualified to perform the profession (information asymmetry[922]). It may be argued that in general clients are not sufficiently informed about the quality of the design services provided by architects.[923] Therefore, if clients hire architects who are not sufficiently qualified to perform the design activity, they may have more risks of damages.[924] Because of the protection of the function of architects, clients are

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921 Cooter and Ulen, 2004, pp. 44, 286-288; Van den Bergh, 2000, pp. 51-59. The lack of a healthy competition may also cause differentiation of prices. Architects may ask clients different prices for a design because they are the price-fixing party. This may lead to a decreasing demand for designs by clients. Clients who pay € 10 for a design and know that others pay € 7 for a similar design will not be willing to pay € 10 any longer. When architects lower design prices, clients will increase their demand for designs. The public policy for correcting any shortcomings of monopoly (and to achieve maximum profit) might be replacing monopoly with normal competition, or regulating the prices.

922 Information asymmetry means that one party to a transaction has more or better information than the other party (see Akerlof, 1970).

923 See also Busch, 2007, pp. 300-301; Schäfer and Ott, 2005, pp. 503f. Busch argues that especially clients who seldomly hire an architect for their design activities, thus not large-scale companies or governments, lack sufficient information about the architect's quality as they are not or insufficiently capable to judge the architect's services. Moreover, design services can be seen as *Vertrauensgüter*, which implies that their quality is difficult to assess; insofar as *Erfahrungsgüter* are at stake and their quality can yet be disclosed after the use of the service (such as occupation of the building). There is a great risk that the service's quality is insufficient.

924 Stephen and Love, 1999, p. 989.

obliged to hire an architect, which has been sufficiently educated.[925] This seems to reduce the client's costs of damages.

Costs of Spreading the Damage

As has been explained in Chapter 13, the secondary cost reduction goal aims at reducing the costs of spreading the damage, for example, the costs of bearing liability or taking out professional insurance. Obviously, the secondary cost reduction goal is not related to the protection of the function of architects, because this option does not cause secondary costs.

Administrative Costs

Primarily, the protection of the function of architects causes administrative costs of regulating and maintaining these market entry regulations by governments and professional organisations of architects. Furthermore, it seems that if the profession of architects would not be protected, architects would have fewer guarantees of (future) design assignments than in the situation that architects have the exclusive right to perform design activities. This may result in more costs regarding advertisement and trade activities for these architects. Therefore, although this has not been established in literature, it may be argued that the protection of the function of architects reduces the costs of advertisement and trade activities for architects.

(figure: page 173)

3. Architect Liability

Architects may be strictly liable for the non-performance of their obligations under a design contract or they may be liable under the negligence rule. In the Chapters 4 to 10, I examined whether European architects are under an obligation of means or result when they exercise their design duties under the design contract. If they are under an obligation of means, they have to carry out their design services with the professional care and skill generally to be observed in the circumstances of the case. Architects are liable under negligence then. If they are under an obligation of result, architects have to provide a design that is fit for purpose. A design that is not fit for purpose

925 Also Busch, 2007, p. 301.

Cost Reduction of the Protection of the Function of Architects

Architect/Client Cost Reduction Goals	*Architects*	*Clients*
Costs of Prevention and Damage	Costs of education and training.	Clients less costs of damages, because clients have to hire architects that are sufficiently educated to perform design activities.
		Lack of external competition → architects less incentives to control their expenses, less innovation, no possibility for "self-design" or hiring others for design → clients more costs of damage.
Costs of Spreading the Damage	-	-
Administrative Costs	Administrative costs of regulating and maintaining protection of function.	Administrative costs of regulating and maintaining protection of function.
	Less advertising costs for architects.	

leads to the presumption that the architect is liable for the resulting damages. So, strict liability applies in this situation.

I have chosen to examine seven of the most important and comparable duties in the five European countries; the general duty of care, the duty to examine the building site, the duty to adivse on the selection of materials, the duty to advise on applicable laws and rules, the duty to adivse on the construction costs, the duty to represent the client, and the duty to manage and supervise the building works. The figure on page 174 presents the outcomes of this examination. According to this overview, the liability of architects towards their clients when exercising these seven design duties differs to a great extent. Regarding the duty to examine the building site, for

Architect Liability

Country / Duty	Netherlands	Belgium	France	Germany	England
Duty of Care	Negligence	Negligence	Negligence	Negligence	Negligence
Examination of the Building Site	Negligence	Strict	Strict	Strict	Negligence
Advise on Selection of Materials	Negligence	Negligence/ Strict	Strict	Negligence	Negligence
Advise on Applicable Law and Rules	Negligence/ Strict	Negligence/ Strict	Strict	Negligence/ Strict	Negligence/ Strict
Advise on Construction Costs	Negligence	Negligence	Negligence	Negligence	Negligence
Representa-tion	Strict	Strict	Strict	Strict	Strict
Management and Supervision	Negligence	Negligence	Strict	Negligence	Negligence

example, Dutch and English architects are under an obligation of means whereas Belgian, French, and German architects are strictly liable for the non-performance of this obligation. On the other hand, the examination shows that Dutch, German, and English architects predominantly face negligence liability. Belgian architects are sometimes liable under negligence and sometimes strict liability applies. French architects, however, are mostly under an obligation of result towards the client for the non-performance of their design duties.

To try to indicate whether strict or negligence liability is the better regulation option for architects, in this section, I will investigate the costs that are caused by these two options according to the cost reduction perspective. The reference point that will be applied for this analysis is the legal system in which there is no liability at all. It may be argued that in such

systems architects will not take any care regarding their design assignment because taking precautions would only cause costs and would not lead to less liability because there is no liability.[926]

However, an argument can be made that future liability claims of clients are not the only incentive for architects to take precautionary measures. For example, the reputation and good name of architects will also provide incentives for architects to take due care, because taking inadequate care may lead to low-quality designs and consequently may lower the architect's design assignments and income. In this analysis I will assume that these other incentives are similar under the systems of no liability, negligence liability, and strict liability. In other words: the liability system does not influence the reputation incentives and thus the reputation incentives can be neglected if the three systems are compared to each other.

First, in Section 3.1, I will examine the costs that are caused by legal systems that are based on the negligence rule. In Section 3.2 then, the costs that are caused by legal systems that are based on strict liability will be analysed. One of these two options will appear to cause less costs and therefore be the cheaper regulation option. As I have examined seven specific design duties of European architects in this study, in Section 3.3, I will look whether this 'cheapest option' actually fits each of these seven specific design duties.

3.1. The Negligence Rule

Costs of Prevention and Damage

Under the negligence rule, architects will be induced to take precautionary measures in order to try to escape their liability towards the client.[927] Architects will only be liable towards the client if their level of care was less than the standard of reasonable or due care, which has been determined by laws or standard conditions.[928] This standard of care determines the level of care that architects have to take while performing their design activities in order to comply with their design assignment towards the client. Accordingly, architects will try to choose a level of precautions that satisfies that standard of care.[929] Obviously, this causes costs of prevention for architects. Architects will have to consider how many precautions they want

926 See Shavell, 2004, p. 179.

927 Shavell, 2004, p. 196.

928 Shavell, 2004, p. 180; Schäfer and Schönenberg, 2000, p. 160; Calabresi and Hirschoff, 1972, pp. 1056-1057. In general, service providers seem to owe the client a duty to perform the service with reasonable care and skill; PEL/*Barendrecht/Jansen/Loos/Pinna/Cascão/Van Gulijk*, SC, pp. 219f.

929 Vanden Borre, 2001, p. 531; Schäfer and Schönenberg, 2000, p. 160; Faure, 2005(b), p. 11.

to take in order to comply with the standard of care. Furthermore, they have to apply this care. It would be ideal if architects observe such a level of precautions that the costs of care and the costs of damages are minimized (Learned Hand rule)[930]. However, this trade-off may not be applied in a rational manner. Risk-averse[931] architects may take too many precautions in order to, in any case, comply with the standard of care, because they want to avoid to be held liable for not having taken sufficient care.[932] For example, if clients require architects to deliver a highly innovative design (instead of the traditional, tested design approaches), architects may be inclined to observe too many precautionary measured. Especially risk-averse architects may incur more costs of prevention than rational (risk-neutral)[933] architects who will probably take fewer precautions. Whether professionals are risk-averse, and take recourse to "defensive practices" (overly cautious conduct) is disputed, but I will assume that at least some architects are risk-averse and will take too much care which is costly. For example, they may recommend building materials that are unnecessarily strong and thus too expensive.

Costs of Spreading the Damage

Under negligence liability, architects still have to bear part of the damage themselves. After all, architects in these systems may escape liability if they have complied with the required standard of care. Therefore, under negligence liability, risk-averse clients may be willing to take out first-party insurance to cover future damage.[934] This may reduce the costs of spreading the damages. This, however, is no cost that is caused by negligence liability. Risk-averse clients will also tend to take first party insurance in case of no liability.

Administrative Costs

A negligence based liability system causes settlement and litigation costs, because the parties and judges have to establish negligence; they have to determine whether or not an architect has taken sufficient precautions in order to comply with the standard of care. In particular, as we will see,

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930 See, for example, Shavell, 2004, pp. 185f and Salvador-Coderch, Garoupa, and Gómez-Ligüerre, 2004.

931 Risk-averse people do not like taking risks and value their utility higher with the certainty of not having to bear losses than with the uncertainty of having to bear losses.

932 Schäfer and Schönenberg, 2000, pp. 160, 614; Shavell, 2004, pp. 193-197; Faure, 2005 (b), p. 7.

933 Commonly, people are said to be risk-avers. However, people may also be risk-neutral and prefer to bear future damages themselves instead of shifting this risk to someone else such as an insurance company. See Section 5 of this Chapter.

934 Van den Bergh, 1990, pp. 37f.

negligence liability systems may lead to more trials in comparison with strict liability, because the question whether architects have breached the standard of care will often cause disputes.[935] This translates in high settlement and litigation costs.[936]

(figure: page 178)

3.2. Strict Liability

Costs of Prevention and Damage

As the diagram shows, strict liability is less common in the legal systems for architects than negligence liability is. For instance, the general duty to deliver a design is not linked to strict liability. In Belgium and France, however, architects are strictly liable towards the client for damages that affect the construction's solidity or essential elements of the building that result in a construction that is unsuitable for its purpose (see Article 1792 *Code Civil*). Furthermore, Belgium, German, and French architects are strictly liable for the non-performance of their obligation to examine the building site. In case of misrepresentation of the client, in all countries a strict liability system applies. But still, negligence liability seems to be more dominant in European architect law than strict liability. However, as we have seen in the comparative analysis, architects and clients may individually agree on strict liability in the design contract for the general or one of the more specific duties of the architect, such as the examination of the soil.

If strict liability applies to the legal relationship between architects and clients, architects bear all risks of their behaviour.[937] As a result, they have to pay for all losses caused to the client.[938] It may therefore be argued that architects will want to take optimal care and precautions in order to prevent

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935 Shavell, 2004, pp. 283-285. It has also been argued that clients are reluctant to claim damages because it may be difficult to establish a breach of the architect's standard of care.

936 Schäfer and Schönenberg, 2000, pp. 613-614.

937 Schäfer and Schönenberg, 2000, p. 617.

938 See for example Shavell, 2004, pp. 178ff; Faure, 2005(b), p. 11f. For this purpose, I consider the non-performance of design services by architects as unilateral accidents. Only the architect's precautions affect accident risks, the behaviour of clients does not. However, it may be argued that regarding some of the architect's obligations, the behaviour of clients may be of considerable importance as well. This for instance applies to the architect's duty to estimate the costs of the works. In case law, frequently the situation occurs that architects are liable for the non-performance of their duty to estimate the costs, whereas clients have not duly performed their obligation to inform the client about their approximate budget either. This non-performance may be considered as a bilateral accident, therefore. In such event, both the architect and the client could have taken care and thereby lower the risk of damage.

Cost Reduction a Negligence Based Liability System

Architect/Client Cost Reduction Goals	*Architects*	*Clients*
Costs of Prevention and Damage	Architects will have incentives to comply with the standard of care → prevention costs.	Architects will have incentives to comply with the standard of care → less risk of damage clients.
	Risk-averse architects may take too many precautionary measures → this may result in unnecessary high prevention costs.	
Costs of Spreading the Damage	-	-
Administrative Costs	Parties and judges have to establish negligence which causes settlement and litigation costs.	Parties and judges have to establish negligence which causes settlement and litigation costs.

damage to the client. If taking care is too expensive, they will let the damage occur. However, like under the negligence regime, risk-averse architects may take too many precautions as they want to prevent the occurring of any damages.

Costs of Spreading the Damage

Generally, if strict liability applies, architects will bear the risk of losses. The risk of damage for which it is too costly to take preventive measures, is thus shifted from the client to the architect. If both the client and the architect are risk-neutral, the costs consequences are zero. If clients are more risk-averse than architects, however, there is net social gain. Moreover, risk-averse architects may be willing to take out professional liability insurance and shift the risk to the less risk-averse insurance company.[939] This may reduce the costs of spreading the damage even more.

[939] Van den Bergh, 1990, pp. 37f; Van den Bergh, 2001, p. 124.

However, under strict liability, clients will be less willing to take out first-party insurance than under negligence liability because architects (or their insurers) usually bear the costs of damage.[940] First-party insurance may be an even more attractive (less costly) risk-spreading alternative. So it is hard to determine the effect of strict liability on the costs of spreading the damage to the most appropriate person.

Administrative Costs

Generally, the settlement and litigation costs of strict liability systems are considered to be low because the procedures can be fast and simple. However, it may be argued that strict liability results in many liability claims because judges do not have to establish whether or not the architect has breached a standard of care. Therefore, clients may more frequently claim damages. The corresponding high number of lawsuits seems to result in high litigation costs.[941]

(figure: page 180)

3.3. Choosing Strict Liability for the Seven Specific Duties

In the comparative part of this study I examined seven specific duties of architects under the design contract. This comparative analysis showed many differences as to whether European architects are under an obligation of means or result towards the client. In the Sections 3.1 and 3.2, I applied the cost reduction perspective of Calabresi to analyse the costs that are caused by legal systems based on strict liability or on the negligence rule.

First, this cost reduction perspective shows that the costs of prevention for architects are equal in legal systems based on strict or negligence liability. Under negligence liability, architects are induced to take precautionary measures in order to comply with the level of care that is required. But if strict liability applies, architects will also have incentives to take precautionary measures because in general they will have to bear the damage and therefore they may want to reduce this damage by taking precautions. Under both liability systems, architects may even take too many precautionary measures. For example, if negligence liability applies, risk-

940 See, for example, Shavell, 2004, pp. 262-265; Van den Bergh, 2001, p. 124; Faure, 2005(b); Salvador-Coderch, Garoupa, and Gómez-Ligüerre, 2004. See also Section 5 of this Chapter.

941 Shavell, 2006, pp. 282-283; Van den Bergh, 2001, p. 123.

Cost Reduction of a Strict Liability System

Architect/Client Cost Reduction Goals	*Architects*	*Clients*
Costs of Prevention And Damage	Architects will have many incentives to take precautions, because they will not want to bear all damages → costs of prevention.	As architects have many incentives to take precautions, clients seem to have low costs of damages.
	Risk-averse architects may take too many precautionary measures → high prevention costs.	
Costs of Spreading the Damage	Ambiguous: cost savings when client is more risk-averse than architect, also depending on the attractiveness of taking out insurance by architect or client.	
Administrative Costs	More lawsuits as it is an uncomplicated system → settlement and litigation costs.	More lawsuits as it is an uncomplicated system → settlement and litigation costs.
	Judges do not have to establish negligence → less settlement and litigation costs.	Judges do not have to establish negligence → less settlement and litigation costs.

averse architects may take unnecessarily high prevention costs. So, according to the cost reduction perspective, the costs of precautionary measures appear not the decisive factor in choosing between strict or negligence liability as the better liability system. Both liability systems result in the same socially optimal behaviour.[942]

Secondly, the cost reduction perspective showed that if the architect is the superior risk bearer, strict liability systems may reduce the costs of spreading the damages. Whether or not the architect is the superior risk bearer to a great extent depends on his insurance cover. In this respect, it is

[942] See also Shavell, 2004, p. 181.

important to see that clients will be not so willing to take out insurance if strict liability applies because architects usually bear the costs of damage.

Thirdly, whether negligence or strict liability applies, both systems cause administrative costs. However, it may be argued that negligence liability systems cause more settlement and litigation costs than strict liability systems. After all, under strict liability courts have to determine the magnitude of the loss, whereas under the negligence rule courts in addition have to determine the level of care actually taken and calculate the socially optimal level of due care.[943] So a negligence based liability system seems a simpler and uncomplicated liability system, causing less litigation costs. On the other hand, strict liability will cause liability claims by clients more frequently than if negligence liability applies, which also causes settlement and litigation costs.

As results from the cost reduction analysis, strict liability is the cheaper regulation option. Foremost, this is because the costs of spreading the damage and the administrative costs are less under strict liability than under negligence liability. It may therefore be argued that it would be better to base European architect liability on strict liability. However, as follows from the comparative part, Dutch, German, and English architects are more often under negligence liability than under strict liability and Belgian architects are often liable under the negligence rule as well. How does this relate to the fact that the cost reduction perspective hints towards strict liability for European architects? In the following paragraphs, I will explain what the cost reduction outcome (strict liability) implies if we look at the seven specific design duties I compared in this study. I will use the same order as I did in the comparative part of this study, so I will begin with the architect's duty of care.

As we have seen in the comparative part, European architects are under an obligation of means towards the client and have to perform their design activities with reasonable care as established in general contract law or English common law. To impose strict liability to architects whenever they have not delivered a design that complies with this reasonable care could cause many problems. After all, providing a design is very tied up with innovation, trying new ideas or applying experimental approaches. In strict liability systems, experimental or innovative designs can easily lead to liability after the building is realised because often yet after several years enough experience has been gathered to be able to review them. Imposing architects to strict liability would have the effect that architects refrain from applying these innovative ideas or undertaking these experimental approaches, whereas these are very important to the profession. Architects can not be judged by hindsight; architects can only be required to deliver a

943 Shavell, 2004, p. 181.

design that is in conformity with the state of the art requirements that apply at the time of designing. If architects do not conform to this state of the art, they are under negligence liability. However, it can be argued that in case of *traditional* design approaches architects can face strict liability. If architects are required by the client to merely provide a conventional design, it seems not that strange to expect them to deliver a design that is fit for purpose. After all, in these circumstances, architects can be considered to have enough experience to provide such design. Moreover, regarding the costs of spreading the damage (secondary costs), architects seem superior risk bearers in that situation because insurance companies will cover the risk of damage more easily in case of traditional designs compared to innovative or experimental designs. So, as a result, in case of traditional design assignments, the cost reduction perspective shows that European architects can face strict liability.

The obligation to examine the building site is one of the first obligations that architects have to perform under the design contract. This obligation has been investigated in Chapter 5. Accordingly, in three of the five countries that were examined (Belgian, France, and Germany), strict liability applies if the architect has not duly performed their obligation to examine the building site. In these countries, the comparative analysis matches with the cost reduction outcome. Dutch and English architects however, are under an obligation of means towards the client. According to the cost reduction perspective, strict liability may be the better regulation option if these architects are superior risk bearers. So the question is whether or not their risk of damages due to the non-performance of this obligation is adequately covered by insurance. In that case, strict liability is preferred over negligence liability.

The third duty I examined in the comparative part of this study is the architect's obligation to advise the client on the selection of building materials for the carrying out of the construction works by the building contractor. As we have seen, one of the main problems with this duty is that the building materials that architects advise for the construction of the works may appear not suitable during or, even worse, after the realisation of the building works. The comparative analysis shows that European architects more often face negligence liability than strict liability. As I explained earlier with the general duty of care, when architects would face strict liability, problems will rise regarding innovative or experimental building materials that may be applied by architects. Furthermore, architects will have difficulties insuring their risk of damage if they apply these experimental or innovative building materials. As a result, architects are not the superior risk bearers and the costs of spreading the damages will not be reduced then. Therefore, strict liability seems not very compatible when architects apply innovative building materials. If they apply traditional

building materials however, architects will be considered to be familiar with these materials and their risk of damage seems easier to insure, which means that they are superior risk bearers. So when traditional building materials are applied, a strictly based liability system for architects is possible according to the cost reduction perspective.

As we have seen in Chapter 7 of this study, European architects are generally required to observe the applicable (public and private) laws and rules, such as building regulations and the Housing Act, in order to be able to deliver a design that is fit to obtain a building license. This is considered a minimum level of what architects are expected to observe. In each of the legal systems I compared, architects are strictly liable if they do not comply with this obligation. In Germany, even stronger, architects have to guarantee that the design they provide complies with this minimum level (the *anerkannten Regeln der Technik und Baukunst*). So the comparative analysis matches with the outcome of the cost reduction perspective. However, it should be taken into account that often legal obstructions occur, which prevent that a building license is being granted for the design. In the Netherlands and Germany, it has therefore been established that in case of legal obstructions that may prevent the design from obtaining a building license architects are just under an obligation of means to try to get an exemption so that the building license can be obtained. Architects can not be expected to guarantee that the design they provide is eligible to obtain a building license. Now that the cost reduction perspective shows that strict liability would yet be the cheaper regulation option, it can be argued however, that architects are superior risk bearers if they can easily take out adequate insurance cover for the risk of damages caused by not obtaining a building license. In this respect, it should be considered though that considerable damages may be caused as the client has had high expenses of hiring an architect for the design assignment whereas the final result (providing a design that is eligible to obtain a building license) is not achieved.

The next duty I examined in the comparative part is the duty to advise the client on the construction costs of the project. Basically, architects can at best be expected to estimate the construction costs as accurately as possible ('approximately'). Architects are not allowed to exceed the cost estimation that was agreed upon with the client. However, in most countries certain margins exist as it would be unfeasible for architects to provide 100 % precise cost estimations. As explained in the comparative part, another difficulty with this obligation is that architects largely depend on the service performances of other building participants such as technical engineers and building contractors. Architects have to take into account the performances of these other contractors as well. As a result, European architects basically face negligence liability. However, according to the cost reduction analysis,

it can be argued that strict liability would be the better option. First, under strict liability architects have less litigation and settlement costs than if negligence liability applies. After all, under negligence liability courts have to establish the level of care actually taken and calculate the socially optimal level of due care. As we have seen, this is a time- and cost consuming task. Secondly, the cost reduction perspective shows that under strict liability architects are superior risk bearers if they are adequately covered by insurance. It is common knowledge in construction law that the construction costs are frequently exceeded. As extensive case law shows (see Chapter 8), often high amounts of damages are involved if architects exceed the agreed construction costs. Therefore, it seems that architects shall be willing to take out professional liability insurance and shift the risk of these damages to an insurance company, which obviously reduces the costs of spreading the damages.

Regarding the architect's authority to act on behalf of the client, the comparative analysis in Chapter 9 showed that architects are basically strictly liable towards the client if they exceed the scope of their authority or if they act on behalf of the client whereas they lack the client's authority to do so. So architects are under an obligation of result, which means that they can not just 'do their best' if they act on behalf of the client. The comparative analysis and the cost reduction outcome therefore match. However, it should be taken into account that if we look at the costs of spreading the damages (secondary costs) that are caused by the non-performance of this obligation, it seems difficult to determine who the superior risk bearer is as often three contracting parties (architect, client, and building contractor) are involved in occurring liability issues.

The final specific design duty of architects I examined in the comparative part is their duty to manage or supervise the building works. Overall, as we have seen, architects are under an obligation of means when they perform these supervision or management obligations. However, according to the cost reduction perspective, strict liability is the cheaper regulation option. It can be argued that the client is the superior risk bearer because often he can also claim damages from the building contractor for not duly performing his obligation to carry out the construction works. So if strict liability applies the costs of spreading the damages would be reduced to a great extent.

4. Limitation of Architect Liability

The third regulation issue that has been examined in this study is the limitation of architect liability. As we have seen in Chapter 11 of this study, architects may respond to the liability claims of clients by trying to limit their liability towards these clients (or by taking out professional liability insurance which will be analysed in Section 5). Architect liability, for

instance, may be limited to its time, extent, and kind. In Chapter 11, I explained the architect's possibilities to limit his liability towards clients by describing four items; the legal liability period, the contractual limitation of the liability period, the contractual limitation of the liability extent, and the limitation of the architect's personal liability in a private company with limited liability. In the figure on page 186 these four issues are shown.

As follows from the examination in Chapter 11, there are two basic options for architects to limit their liability towards the client. The first option is to contractually limit the liability period or extent. The second option is to limit architect liability by performing one's professional activities in a private company with limited liability. In the following sections, I will apply Calabresi's cost reduction perspective to analyse these two options. I will examine what prevention and damage costs, costs of spreading the damage, and administrative costs are caused by each of these three options. In Section 4.1., I will examine these costs for the first option and in Section 4.2. for the second option. The reference point for this examination is the situation in which there are no possibilities to limit architect liability.

4.1. Contractual Limitation of the Liability Period and Extent

Whereas, in the Netherlands and Germany, clauses that limit the *period* of architect liability frequently occur in standard conditions or *Einheitsverträgen* or *vorformulierten verträgen*, this is different in the other three countries. To Belgian and French architects a ten-year liability period applies after the acceptance of the works. Because this ten-year liability was established because of public order interests, these architects are not allowed to contractually limit this liability period. Furthermore, English architects are not allowed either to contractually limit the liability periods that apply to them.

As to the *extent* of architect liability, in the Netherlands and England standard conditions usually contain clauses that limit the extent of architect liability. In Germany, the BGB allows architects to apply *Individualvereinbarungen* but many restrictions as to the application of these clauses have been formulated. In Belgium and France, contractual clauses that limit the extent of the architect's liability are not commonly applied. In Belgium, such clauses are not allowed because of the obligatory intervention of architects for the client's design activities that has been established in Article 4 *Architectenwet*. It would be contradictory to allow contractual clauses that the extent of the architect's liability then. In France, a similar rule has been established: individual contract terms may be allowed unless

Limitation of Architect Liability

Country	Legal Liability Period	Contractual Limitation Liability Period	Contractual Limitation Liability Extent	Limitation Personal Liability
England	- 6-year primary limit. period - 15-year final limitation period	Not allowed	Common in standard cond.: requirements in common law & UCTA	Yes
Germany	- 2, 3, or 5 years - 3 years for intentional faults	Allowed. See BGB. Often vorformuliert or ein-heitsarchitektenvertrag (AVA)	Individualverein-barung in BGB. Several exclusions in BGB however	Yes
France	- 30 years - after acceptance: 10 years for damage to solidity or essential elements 2 years for dissociable elements 1 year for entrepreneurs	Not allowed for 10-year liability period because of public order. Other liability periods not allowed to be limited either	Not common because no standard cond. Individual contract Terms are allowed but not if they limit 1792-damages (public order)	Yes
Belgium	- 10 years - after acceptance: 10 years for damage to solidity or essential elements	Only allowed if 1792-damages not limited (public order)	Not allowed (Art. 4 Archwet). For certain design activ. allowed unless 1792-damages	Yes
Netherlands	- 20 years - 5 years on behalf of standard conditions	Common because of standard conditions: 5 -year period	Common in standard conditions: fee and direct damage	Yes

they try to limit the liability of architects for damages that flow from Article 1792 *Code Civil*.[944]

944 As has been explained in Chapter 11, in case law for certain activities such contractual clauses were allowed. However, if the purpose of these clauses is to limit the extent of

The efficiency of contractual clauses (in standard conditions) has been broadly discussed in literature.[945] There are three main issues. Firstly, the costs and benefits allowing exclusion clauses depend on the effects on prevention of damage. The next issue is whether it is more efficient to let the damage be suffered by the party who limits its liability or by the victim. This is the issue of which party is the superior risk bearer. Thirdly, compared to governmental legislation, allowing exclusion clauses in standard conditions can be efficient as they have been established by means of self-regulation (often by professional organisations).[946] Self-regulation may be less costly, and lead to better regulation, because professional organisations know more about risks and the optimal ways of spreading it than governments. Exclusion clauses in standard conditions may therefore reduce the overall costs of contracting parties to a great extent.[947]

In the following sections I will analyse the costs of prevention and damage, the costs of spreading the damage, and the administrative costs that are caused by contractual clauses that limit liability.

Costs of Prevention and Damage

If architects are allowed to contractually limit their liability in individual clauses, they will not be liable anymore towards the client or they may be liable to a less extent.[948] As a result, architects may tend to take fewer precautions if they can limit their liability than in the situation that they are unlimitedly liable. This is called moral hazard.[949] As a consequence, architects may have fewer costs of prevention, but this is likely to be offset by a higher amount of extra damages for clients. However, there may be

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the architect's liability for damages that flow from Article 1792 *Belgisch Burgerlijk Wetboek* they are not allowed.

945 For instance, Easterbrook and Fischel, 1996, pp. 40-41; Cooter and Ulen, 2004; Goldberg, 1974; Posner, 1974; Velthoven and Van Wijck, 2001; Van den Bergh, 1990; Faure and Van den Bergh, 1980; De Geest, 1994, pp. 286-290; Asser/Hartkamp 4-I (2000), nos. 339f; McKendrick, 2005, pp. 443-501; Van Bijnen, 2005, pp. 158-160; Weterings, 2005, pp. 139-143; Duyvensz, 2002; Loos, 1998.

946 It is argued, however, that one of the contract parties may be in a position of power because this party forces the other party to apply his standard conditions; Cooter and Ulen, 2004, pp. 287-289; De Geest, 1994, p. 280f; Duyvensz, 2002, p. 45f. These are called take-it-or-leave-it agreements or contracts of adhesion. See Kessler, 1943; Stephen and Love, 1999; and Carney, 1999.

947 Furthermore, whereas governmental legislation is being paid by the whole society through taxes (and only those who are professionally related to the legislation gain the benefits), with self-regulation the costs are internalised; only those who eventually gain profit of the standard conditions bear the costs. This is an efficient way of cost allocation; Llewellyn, 1939.

948 See also McKendrick, 2005, pp. 443-444.

949 Samuelsen/Nordhaus, 1998, p. 195; Cooter and Ulen, 2004, pp. 54, 354-355; Easterbrook and Fischel, 1996, p. 60. See Sections 4.2 and 5.1.

other incentives for prevention than liability (reputation, government regulation) that mitigate these negative consequences of allowing limitation of architect liability.

Costs of Spreading the Damage

Exclusion clauses may contribute to optimal spreading of damage if clients are superior risk bearers.[950] Clients may be superior risk bearers if they are in the best position to accept the costs of the architect's limitation of liability, for example because they can take out first-party insurance at lower costs than architects can take out liability insurance.[951] Large-scale companies, for instance, may be able to take out CAR insurance, which covers all material damage arising at the construction site irrespective whether it is caused by a faulty design or by a mistake in the construction process.[952] However, if architects are (legally) obliged to take out professional liability insurance, which also covers this damage, they may be considered superior risk bearers. This will be analysed in Section 5 of this Chapter.

Administrative Costs

If we compare exclusion clauses in standard conditions with the option of not allowing any limitation of liability, there are extra drafting[953] and negotiation costs between clients and architects or between their professional organisations. These may be one-time costs, because once the exclusion clauses have been established, individual negotiations are no longer necessary and the clauses in standard conditions may apply repeatedly to other design assignments. However, in practice, clients may want to modify the clauses that architects want to apply. For example, clients may consider the architect's standard conditions too detailed in the event of small-scale design assignments, or large-scale clients may want to apply their own standard conditions. Thus, there are extra drafting and negotiation costs for both architects and clients.

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950 See also Chao-Duivis, and Koning, 2001, pp. 26f on the allocation of risks according to Abrahamson ('Risk Management', *ICLR* 1984), Jones ('Philosophies of risk allocation: the case for foreseeability', *ICLR* 1996), and Pirie ('Contractual Problems connected with major infrastructural projects', *ICLR* 1995) for instance. In short, the allocation of risks can be achieved by means of allocating the risk to the party that can control the risk at *lowest costs* or allocating the risk to the party that is *best able* to control the risk. See also van den Berg, 1997, pp. 179f on the allocation of risks to the party who is best able to control them.

951 De Geest, 1994, pp. 59f; Van den Bergh, 1990, p. 12; Calabresi, 1970, pp. 27-28.

952 See Chapter 13 for more about CAR insurance.

953 De Geest, 1994, pp. 84-85.

Furthermore, if more than one set of standard conditions may apply to the design contract, (battle of the forms) negotiation costs may be caused, because architects and clients have to determine which of the available sets of standard conditions will be applied to the design contract.[954] If these negotiations fail, dispute resolution may be needed, which causes costs of settlement.[955]

Finally, standard conditions cause some extra negotiation costs, because they do not automatically apply to design contracts. Another type of costs is the category of costs of error, because the exclusion clause may not be read by the client (this is called signing without reading) and the clause results in a regime of damages (primary and secondary costs) that is not optimal for this particular relationship. This may happen because reading takes time or because the client has not been explicitly informed about the applicability of the exclusion clauses to the design assignment (information asymmetry).[956] These costs have also to be taken into account.

(figure: page 190)

4.2. Limitation of Personal Liability

As the comparative analysis in Chapter 11 showed, in all five Member States that were examined, architects are nowadays allowed to perform their professional activities in a private company with limited liability. As a result, these architects are not liable in person towards the client for any damages as the company is the client's contracting party. In Belgium, this rule has only recently been established. As a result of a research report (CEA Belgium) that was published in 2004 and according to which Belgian architects appeared outsiders in Europe at this point, in 2007, the *Laruelle Wet* came into effect. This law provides rules that allow Belgian architects to perform their professional activities in partnership with limited liability.

In this section, I will examine the costs that are caused by the limitation of architect liability in a private company with limited liability. In the comparative part, I did not examine the exact conditions that apply to this regulation option per country. As explained in Chapter 11, general law of legal persons applies. There seemed no reason to assume that the situation that architects are no longer liable in person towards the client would lead to increasing legal disputes between architects and clients. Therefore, in the

954 In the Netherlands, this is strengthened by the fact that clients, since the Dutch fraud in construction was at stake, have become reluctantly to apply architect's standard conditions. Standard conditions that have been established by both clients and architects are preferred nowadays.

955 See also Duyvensz, 2002, p. 42.

956 De Geest, 1994, p. 283; Duyvensz, 2002, p. 41f.

Cost Reduction of Contractual Limitation of the Liability Period

Architect/Client Cost Reduction Goals	*Architects*	*Clients*
Costs of Prevention and Damage	Moral hazard → architects may have incentives to act with less care → less costs of prevention architects.	Architects are not liable towards the client or liable to a less extent → moral hazard → less incentives to take precautionary measures → more damages clients.
Costs of Spreading the Damage	Architects may be cheapest risk bearer, for instance if they are obliged to take out professional liability insurance.	(Large-scale) client may be cheapest risk bearer.
Administrative Costs	One-time drafting and negotiation costs → no individual drafting and negotiation costs for architects and clients.	One-time drafting and negotiation costs → no individual drafting and negotiation costs for architects and clients.
	Drafting and negotiation costs if clients want to modify the exclusion clauses.	Drafting and negotiation costs if architects want to modify the exclusion clauses.
	Negotiation costs to determine which of the available sets of standard conditions applies → dispute resolution costs if these negotiations fail.	Negotiation costs to determine which of the available sets of standard conditions applies → dispute resolution costs if these negotiations fail.
	Costs of error because client is not informed about the applicability of the clauses.	Costs of error because architect is not informed about the applicability of the clauses.

cost reduction analysis below the costs of limiting architect liability in a private company will be shown, regardless of the specific requirements that may apply in each legal system.

Costs of Prevention and Damage

As architects are generally allowed to perform their professional activities in a private company with limited liability, they are not personally liable for liability claims from clients. This means that these architects are not liable for more than the amount they contribute to or leave in the company.[957] As a result, architects may be liable towards the client to a lesser extent and will have to pay less compensation costs to the client.

It may be argued that these architects will tend to take less precautions than when their liability is not limited (moral hazard) and will therefore have fewer costs of prevention.[958] However, for clients the costs of damage seem to increase if architects take less care in the situation that they are limitedly liable.

Costs of Spreading the Damage

Generally, it can be argued that legal entities, such as private companies with limited liability, can better face the liability risks than architects themselves. But the consequence of limitation of the architect's liability in a private company with limited liability seems that clients and architects share the risk of damage.[959] Here the issue is again who is the superior risk bearer and to what extent. It may be argued that it is better to spread the risk of damage among both architects and clients instead of letting architects bear the full risk of damage under unlimited liability. For example, if clients are in a better position than architects to accept the costs of the architect's limitation of liability by taking out first-party insurance, the costs of spreading the damage may be reduced.

Administrative Costs

The most important administrative costs of this option are the costs of architects to start and manage a private company with limited liability.[960]

(figure: page 192)

957 See Easterbrook and Fischel, 1996, pp. 40-41; Burssens (et al), 2007, p. 153.

958 Samuelsen/Nordhaus, 1998, p. 195; Cooter and Ulen, 2004, pp. 54, 354-355; Easterbrook and Fischel, 1996, p. 60. See Sections 4.1 and 5.1.

959 Easterbrook and Fischel, 1996, p. 47.

960 See, for instance, Burssens (et al), 2007, p. 103.

Cost Reduction of Limiting Personal Liability

Architect/Client Cost Reduction Goals	*Architects*	*Clients*
Costs of Prevention and Damage	Moral hazard → architects may have incentives to act with less care → less costs of prevention architects.	Architects liable to a lesser extent → moral hazard → less incentives to take precautionary measures → more damage clients.
Costs of Spreading the Damage	Limitation of the architect's liability in a private company implies that clients and architects share the risk of damage → this may be an optimal way of risk spreading.	Clients have lesser financial guarantees that their damage will actually be compensated because the architect's liability is limited → clients may suffer more damage for which they are not the superior risk bearer.
Administrative Costs	Architects have costs of setting up and managing a private company.	-

5. Professional Liability Insurance

The final regulation issue that has been investigated in this study is the obligation of architects to take out professional liability insurance. In Chapter 12, I examined the reasons for establishing such obligation, its (legal) basis, and the types of insurance that are commonly taken out by architects.

As shown, in four of the five countries examined, architects have an obligation to take out professional liability insurance. Sometimes this obligation is based on the law, such as in Belgium and France. Sometimes this obligation follows from the architect's registration of his title at a registration board. In Germany and England, for example, architects are not obliged by law to take out liability insurance but if they want to carry the title of architect and perform design activities under that title, they have to register and thus are required to take out liability insurance.

Only in the Netherlands, architects are not obliged to take out professional liability insurance. However, they are covered by liability insurance for the most part, because of the applicability of standard conditions to the design assignment with the client, however. Moreover, architects who are member of the BNA are required to take out professional liability insurance as well.

Obligation of Architects to Take out Professional Liability Insurance

Country Obligation to Take out Insurance	Netherlands	Belgium	France	Germany	England
Legal Obligation	No	Yes	Yes	No	No
By Registration Membership Professional Order	No	No	No	Yes	Yes
In Standard Conditions	Yes	No	No	Yes	No
By Membership Professional Organisation	Yes	No	No	No	Yes

Furthermore, the analysis of this final regulation issue showed that building contractors are often obliged to take out professional liability insurance as well. In the Netherlands and England, such obligation has been established in standard conditions. In France, this is a legal obligation. Belgian and German building contractors, however, are not obliged to take out professional liability insurance. In Belgium, recently, the legislator was asked by the *Grondwettelijk Hof* to expand the legal obligation to take out liability insurance to all Belgian building participants such as building contractors.

In the figure on page 194 is shown whether or not building contractors are obliged to take out professional liability insurance, and if so, on what basis. In this section, this obligation of building contractors will be analysed by the cost reduction perspective under the costs of spreading the damage to see whether building contractors may be superior risk bearers than architects. In this section, I will examine the costs of prevention and damage, the costs of spreading the damage, and the administrative costs that are caused by the

Obligation of Building Contractors to Take out Professional Liability Insurance

Country	Netherlands	Belgium	France	Germany	England
Obligation to Take out Insurance					
Legal Obligation	No	No	Yes	No	No
In Standard Conditions	Yes	No	No	No	Yes

fourth regulation issue, the obligation to take out professional liability insurance of architects. The reference point that will be applied for this analysis is the situation in which there is no legal obligation for architects to take out professional liability insurance. As explained, this is the case for Dutch architects, who are free to determine whether or not they want to take out professional liability insurance, which is the second option of this regulation issue.[961] As a result, only the first option of this regulation issue (mandatory professional liability insurance) will be analysed in this section according to the cost reduction framework of Calabresi and it will be compared with the reference point of no obligation to take out professional liability insurance (optional professional liability insurance).

Costs of Prevention and Damage

Belgian and French architects have a statutory obligation to take out professional liability insurance.[962] English and German architects are not under a statutory obligation to take out professional liability insurance. However, if these architects register their name at an order of architects in order to be able to carry the title of architect and want to perform design services under that title, they are obliged to take out professional liability insurance as well.

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961 As has been explained in Chapter 13, most Dutch architects are covered by liability insurance because the standard conditions that frequently apply to design assignments often require architects to take out professional liability insurance. Furthermore, Dutch architects who are members of the BNA are obliged to take out professional liability insurance. However, as this membership is not obliged in particular large-scale architect firms are members of the BNA and under an obligation to take out liability insurance.

962 Article 15 *Reglement van Beroepsplichten* (Belgium) or Article 16 *Code des Assurances* (France).

The most important reason for establishing mandatory insurance for architects is to protect clients against the financial consequences of the architect's breach of contract. If architects are covered by liability insurance, clients more likely see their future damage compensated.[963] This seems to reduce the costs of damage to clients.[964]

However, the fact that architects are covered by liability insurance reduces the incentives for architects to take precautions to prevent or reduce damage because they will not have to bear the damage (moral hazard).[965] This may result in insufficient performance of their service activity, which causes damage to the client. It may be argued that if architects would have to bear the damage themselves, they may be more willing to take precautions.[966] As a result, mandatory insurance for architects seems to imply that architects have less costs of prevention but that the client's costs of damage increase. So, more damage may occur, and even if this damage is compensated in the end by the insurer, this may be disadvantageous for the client.

The literature suggests several solutions for this incentive problem.[967] Architects may have to bear (parts of) the risk of damage, for example, or insurance premiums may be established by taking into account the architect's behaviour (premium differentiation). This implies that insurance premiums increase if insured parties act careless.[968] This may give architects incentives to take sufficient care while performing their design activity.[969] Furthermore, it should also be taken into account that architects may suffer reputation damages as a result of their careless behaviour, which may stimulate them to take precautions.

Costs of Spreading the Damage

If architects are covered by liability insurance, clients are less likely to take out first-party insurance[970] for any future damage, although they may be superior risk bearers than their insurers.[971] As most architects are considered

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963 See also, for example, Faure, 2005(b), p. 9; Shavell, 2004, pp. 275f; Skogh, 2000.

964 See also, for example, Jones, 2007, pp. 71f.

965 See Samuelsen/Nordhaus, 1998, p. 195; Cooter and Ulen, 2004, pp. 54, 354-355; Easterbrook and Fischel, 1996, pp. 60- 61; Faure, 2005(b), pp. 9, 13.

966 Van den Bergh, 1990, pp. 36-38.

967 See, for example, Shavell, 2004, p. 275f; Faure, 2005(b), pp. 9-10.

968 See Chapter 13, section 2 on the recently established Dutch *Verborgen Gebreken Verzekering*, which also aims at giving the insured party (architect) incentives to take precautionary measures by establishing certain checks by an independent agency.

969 Weterings, 2004, pp. 11-12; Chandler, 1999; Carney, 1999. See also Johnson, 1977.

970 With first-party insurance the client insures himself directly with an insurer. See also Faure, 2005(b), p. 6.

971 See also, for example, Jones, 2007, p. 95 where the Law Commission (UK) has argued that "(…) to require compulsory insurance to be taken on by a wide range of businesses

to be risk-averse, the availability of insurance will increase their utility.[972] However, not all architects are risk-averse; architects may be risk-neutral as well. But risk-neutral architects are also obliged to take out professional liability insurance.[973] Thus, mandatory liability insurance is only optimal from a risk-spreading perspective if liability insurance companies are better risk bearers than architects, and also better than clients.[974]

It is also interesting to see whether building contractors in the examined countries are superior risk bearers, for instance because they are mandatory insured as well. As the comparative analysis in Chapter 12 shows, French building contractors are statutory obliged to take out professional liability insurance. Furthermore, Dutch and English architects are often obliged to take out professional liability insurance as well if they are hired by the client under standard conditions. Belgian and German building contractors, on the other hand, are not obliged to take out professional liability insurance.

So it can be argued that especially French building contractors (because of their statutory obligation) are superior risk bearers. However, it should be taken into account that the professional liability insurance of architects and the insurance that building contractors take out may cover different risks. For example, Dutch and English building contractors, who are obliged to take out insurance cover, usually take out CAR insurance that mainly covers damages that occur at the construction site during the project. But as we have seen in Chapter 12, French architects and building contractors can take out similar liability insurances and can therefore be covered for similar risks of damages.

Administrative Costs

The most important administrative costs that are caused by mandatory liability insurance for architects are the costs of taking out liability insurance and paying for insurance premiums.[975] It has been argued that the costs of these insurance premiums are rising.[976] However, the negotiation costs are lower compared to the reference situation of optional liability insurance. Then, the parties have to investigate who is the superior risk bearer and negotiate individually about possible insurance.

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which are not presently covered (…) could result in simply creating more `deep-pocketed' defendants."

[972] Van den Bergh, 1990, pp. 16, 25; Kaplow and Shavell, 2002, p. 20; Samuelsen/Nordhaus, 1998, p. 193f; Cooter and Ulen, 2004, p. 50-51, 53f; Faure and Van den Bergh, 1989, pp. 105f; Shavell, 2004, pp. 258, 311f.

[973] Van den Borre, 2001, pp. 527f.

[974] See also Van den Bergh, 1990, p. 25f; Faure, 2005(b), p. 7.

[975] See also, for example, Faure, 2005(b), p. 14.

[976] See, for example, Jones, 2007, p. 64f and Smith, Wilson, and Bundschuh, 2001, p. 84f.

Mandatory insurance also increases the verification costs[977] for insurance companies in order to differentiate between good and bad architects. Insurance companies may not be sufficiently informed about the architect's quality and behaviour.[978] Architects may know better than insurance companies whether or not they constitute a high risk, because the information is not equally distributed between architects and insurance companies. Therefore, insurance companies may have trouble to apply apt insurance premiums. Insurance premiums will be based on the average performance level of architects, which implies that architects may have to pay high insurance premiums.[979] Normally, architects who constitute low risks would be unwilling to pay these high insurance premiums and would want to refrain from taking out liability insurance as this does not increase their utility (adverse selection[980]).[981] However, in the event of mandatory insurance, architects are not allowed to refrain from taking out insurance.[982] As a consequence, architects who constitute low risks stay insured, which also causes avoidable administrative costs.

(figure: page 198)

6. Summary

The first regulation issue I examined, market entry regulation, has two regulation options. Firstly, the title of architects may be protected. In that case educational and training requirements that are imposed on architects may raise costs. However, as these requirements aim at protecting clients

977 If these verification costs fall on one side of the transaction, however, although the other side possesses relevant information or could obtain this information with relative ease but does not pass it on because withholding it brings him certain benefits, transactions take place that would otherwise not occur.

978 Van den Bergh, 1990, pp. 25f. See also, for example, Faure, 2005 (b), pp. 7, 13-17.

979 Faure and van den Bergh, 1989. p. 125; Van den Bergh, 1990, p. 17; Van den Borre, 2001, pp. 528, 532.

980 Adverse selection, anti-selection, or negative selection is commonly viewed at insurance markets. It means that if only people who have great risks of losses take out insurance and people with small risks of losses do not take out insurance, this last group may decide not to take out insurance any longer. See Akerlof, 1970; Chandler, 1999; Rotschild and Stiglitz, 1976, pp. 629-649; Cooter and Ulen, 2004, pp. 54-55, 357f.

981 As only bad quality architects (lemons) stay insured then, insurance premiums will increase. Akerlof, 1970; Faure and van den Bergh, 1989, p. 139; Van den Bergh, 1990. pp. 36-37; Faure, 2005(b), pp. 7-8.

982 Often, mandatory insurance has been established in order to fight this problem of adverse selection. It may be argued that an obligation to take out professional liability insurance is contrary to the freedom of contract of these architects. Freedom of contract implies that parties are free to determine with whom they wish to contract and what the contract's content will be. See Van den Bergh, 1990, pp. 16-19; Faure and van den Bergh, 1989, p. 139.

Cost Reduction of the Architect's Obligation to Take out Insurance

Architect/Client Cost Reduction Goals	*Architects*	*Clients*
Costs of Prevention and Damage	As architects are covered by mandatory insurance they will have fewer incentives to take precautions (moral hazard) → less prevention costs.	As architects are covered by mandatory insurance they will have fewer incentives to take precautions (moral hazard) → more costs of damages clients.
Costs of Spreading the Damage	Risk-neutral architects may be superior risk bearers than liability insurers.	Clients may be superior risk bearers, for instance with first-party insurance.
	French building contractors may be superior risk bearers if they are covered for similar risks of damages.	
Administrative Costs	Lower negotiation costs because liability insurance is no issue in individual negotiations.	Verification costs insurance company → high insurance premiums architects → high design prices clients.
		Costs of taking and administering insurance.

from bad quality architects, the costs of damages for clients may be lowered. The regulation and maintenance of the protection of the title of architects by governments or national professional organisations also cause high administrative costs. Secondly, the function of the profession of architects may be protected. In that case, the lack of external competition for architects is likely to inhibit innovation and excludes the possibilities for clients to let others perform the design, which leads to costs for the client. Furthermore, architects will have fewer incentives to control their expenses because their future design assignments are guaranteed by the protection of their function. Finally, the regulation and maintenance of the protection of the function of architects causes administrative costs as well.

Architect liability is the second regulation issue that has been examined. According to the comparative overview, architect liability towards the client

differs to a great extent. However, the analysis shows that Dutch, German, and English architects predominantly face negligence liability. Belgian architects are sometimes liable under negligence and sometimes strict liability applies. French architects, however, are mostly under an obligation of result towards the client for the non-performance of their design duties.

According to the cost reduction analysis, the costs of prevention for architects are equal in legal systems based on strict liability and on the negligence rule. Under negligence liability, architects are induced to take precautionary measures in order to comply with the level of care that is required. But if strict liability applies, architects will also have incentives to take precautionary measures because in general they will have to bear the damage and therefore they may want to reduce this damage by taking precautions.

Furthermore, if we look at the costs of spreading the damage, the cost reduction perspective showed that if the architect is the superior risk bearer, strict liability systems may reduce the costs of spreading the damages. Whether or not the architect is the superior risk bearer to a great extent depends on his insurance cover.

Finally, both liability systems cause administrative costs. However, it may be argued that negligence liability systems cause more settlement and litigation costs than strict liability systems. After all, under strict liability courts have to determine the magnitude of the loss, whereas under the negligence rule courts in addition have to determine the level of care actually taken and calculate the socially optimal level of due care. So a negligence based liability system seems a simpler and uncomplicated liability system, causing less litigation costs. On the other hand, strict liability will cause liability claims by clients more frequently than if negligence liability applies, which also causes settlement and litigation costs.

As I examined seven specific design duties in the comparative part of this study, in Section 3.3 I explained what the cost reduction outcome (strict liability) implies if we look at the seven specific design duties I compared in this study. The decisive factor for choosing between negligence and strict liability according to the cost reduction perspective is: who is the superior risk bearer? So, who is best capable to bear the risk of damages; who can best insure the risk of these damages?

For the duty of care and the duty to select building materials, I distinguished between traditional and innovative designs or materials. In case of traditional designs or building materials strict liability is the best option according to the cost reduction perspective. Regarding the obligations to examine the building site and to act on behalf of the client, I argued that strict liability is the cheaper option if the architect can adequately insure his risk of damages. If we look at the architect's obligation to observe applicable laws and rules, the comparative analysis showed that

architects are basically strictly liable but they can not be expected to guarantee that the design they provide is eligible to obtain a building license. According to the cost reduction perspective, architects who are adequately covered by insurance are superior risk bearers and strict liability would be the better option for them. But this seems difficult as it will be hard to insure the risk of damages caused by not obtaining a building license. Regarding the architect's duty to advise the client on the construction costs of the project, architects basically face negligence liability. However, according to the cost reduction analysis, it can be argued that strict liability would be the better option. Architects would have less litigation and settlement costs and architects shall be willing to take out professional liability insurance and shift the risk to damages to an insurance company because construction costs are frequently exceeded. Finally, I argued that, regarding the architect's duty to manage and supervise the works, the client is the superior risk bearer because clients can often claim damages from the building contractor (instead of the architect) for not duly performing his obligation to carry out the construction works. So if strict liability would apply (instead of negligence) the costs of spreading the damages would be reduced to a great extent.

Limitation of architect liability is the third regulation issue. If architect liability can be limited in exclusion clauses in standard conditions, architects will have fewer incentives to take precautions, because they will be liable towards the client to a lesser extent or not at all. As a result, the costs of damage of the client may increase. Depending on who is the superior risk bearer, the limitation may raise or lower the costs of spreading the damage. Furthermore, limiting architect liability in clauses in standard conditions seems to cause only (one-time) drafting and negotiation costs, but individual judgements may be necessary.

Finally, dispute resolution costs and costs of supply may be caused. If architect liability is limited by performing design activities in a private company with limited liability, architects also seem to have fewer incentives to take precautions, which may cause costs of damage to the client. As a result, clients may have to bear part of the damage themselves. Furthermore, this option causes administrative costs of architects entering a private company.

The final regulation issue is professional liability insurance. This regulation issue has two options; the legal obligation of architects to take out professional liability insurance and the absence of such an obligation. The reference point I applied for the cost reduction theory is the situation that architects have no legal obligation to take out professional liability insurance. If architects are obliged to take out professional liability insurance, it may be argued that they will take fewer precautions (moral

hazard) than architects who are not covered by liability insurance. This causes high costs of damage for clients.

As has been established, one of the major problems of this mandatory insurance system is that risk-neutral architects may be superior risk bearers, because they may be able to bear the risk of damage at lower costs than the costs of taking out liability insurance to cover their risk of damage. However, risk-neutral architects have to take out liability insurance as well. Clients could be superior risk bearers as well, but because architects are obliged to take out liability insurance, clients may not take out first-party insurance to cover future damage. Furthermore, French building contractors may be superior risk bearers if they are covered for similar risks of damages than architects are.

Finally, the obligation of architects to take out liability insurance causes verification costs of insurance companies and administrative costs of architects of taking out liability insurance. Because liability insurance is no issue in negotiations, that may somewhat lower the negotiation costs.

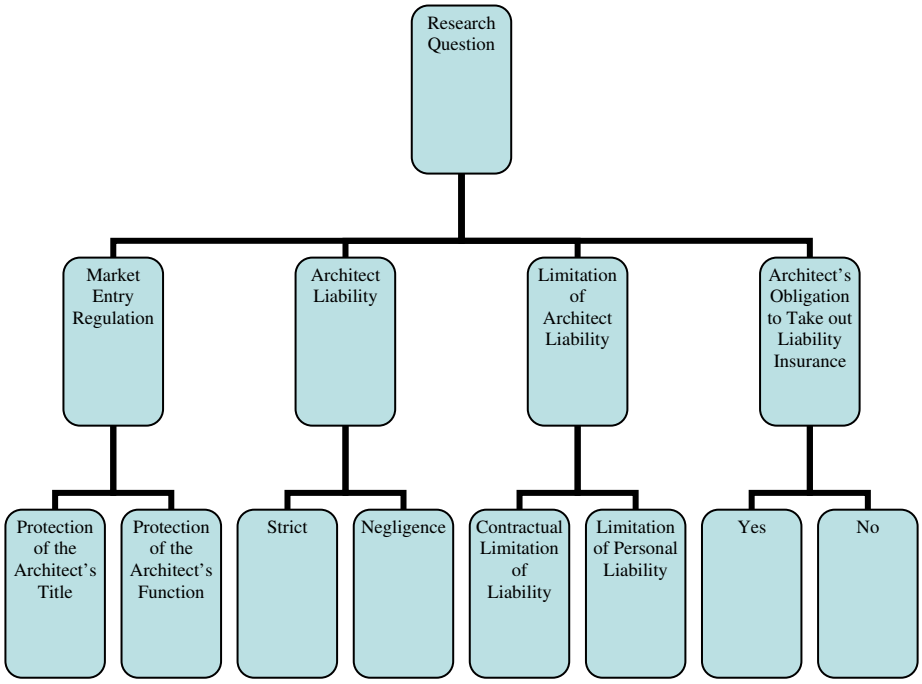
Summary and Conclusions

In European architect law two tensions can be observed. First, many changes take place at the market for the design of buildings. As I explained in Chapter 1, there is a trend that European architects do no longer exclusively dominate the design market. In addition to the traditional design contracts, new market models have been developed that enable other service providers than architects to take charge of design activities in the construction industry. This development interferes with the obligation of clients in some European countries to hire an architect for their design activities whenever they initiate building activities. In these countries, the function of architects is protected in order to deal with the market entry of service providers (see Chapter 2).

The second tension in European architect law deals with the liability of architects. As architects are often exposed to liability claims of clients that exceed their design fee to a great extent, this liability causes serious financial problems to architects. As a result, architects usually limit their liability in individual design contracts with the client. However, the existing rules that govern limitation of architect liability greatly differ in the European Member States. Furthermore, in some countries, architects are obliged to take out professional liability insurance to cover the client's damages. In other countries however, architects are free to determine whether or not they want to take out professional liability insurance.

There are four regulation issues that can be identified from these tensions: market entry regulation, architect liability, limitation of architect liability, and professional liability insurance. In 2006, an extensive comparative research on service contracts was realised under the title Principles of European Law on Service Contracts (PEL SC). The comparison on design services within that research project showed that national rule makers significantly differ in dealing with these four regulation issues. Therefore, I selected five European countries to examine these four regulation issues in more detail; the Netherlands, Belgium, France, Germany, and England (see Chapter 1). Each of the four regulation issues identified has two options that national rule makers mostly apply. These regulation options were focussed on in this comparative analysis. The figure on page 203 clearly shows the four regulation issues and their options.

To analyse which of the two regulation options is the 'best option', a law and economics perspective was applied. Basically, such law and economics perspective provides an objective method to choose between the regulation



options. In particular, economic analysis may help to establish which of the regulation options is likely to lead to more efficient outcomes. Different legal rules lead to different costs and benefits for both parties to a transaction. Predicting these costs and benefits may lead to preferring one rule over the other. Economic analysis provides a scientific theory to predict the effects of legal rules on behaviour and on the outcomes for the affected parties, such as architects and clients.

I applied Calabresi's cost reduction perspective in this study. This perspective aims at the reduction of three types of costs; the costs of prevention and damages (primary costs), the costs of spreading the damages (secondary costs), and the administrative costs (tertiary costs). As explained in Chapters 1 and 13, Calabresi's cost reduction perspective is usually applied to tort law. In this study however, this theory has been applied to contractual agreements, such as the contractual relationship between architects and clients.

In this final Chapter, the most important findings of the comparative Chapters (Chapters 3 to 12) of this study will be summarized. Furthermore, per regulation issue, the conclusions from the law and economics evaluation of the regulation options will be described. Finally, I will answer the research question of this study; *which combination of regulation options on market entry, architect liability, limitation of architect liability, and insurance is optimal in view of the European architect's and client's legitimate interests*.

The First Regulation Issue: Market Entry Regulation (Chapter 3)

Rules on the market entry of service providers usually have the purpose to safeguard the quality of a particular profession. In this respect, market entry regulation increases the quality of services and service providers. Mostly, this regulation imposes training and education requirements to service providers before they are allowed to enter the market and provide services at that market. However, rules on market entry have an important downside too, because they can limit the access of service providers to a profession. As a result, possible competitors cannot perform their services at these markets. The level of competition in that profession then decreases. As described in Chapter 3, it is argued that the service providers who do have access to the market benefit from a professional monopoly.

As we have seen in the comparative part, European architects have a legal obligation to register their name at registration boards in order to be allowed to carry the title of an architect. This is the protection of the title of architects. This mandatory registration requires architects to have complied with several educational and training requirements, which differ per country. This protection of the title of architects seems to aim at protecting the quality of the profession of architects.

In addition to this title protection, Belgian and French clients who initiate building activities have a legal obligation to engage an architect for their design activities. This is the protection of the function of architects. In particular, these clients are obliged to hire an architect if their design activities require a building license, which seems to cover most building activities. In both of these countries, this legal obligation has been established to protect the public safety and therefore complies with the rules that have been established in the Bolkestein Directive. Dutch, German, and English clients, on the other hand, are free to determine whether they want to hire an architect for their design activities. So in these countries, the function of architects is not protected.

The cost reduction perspective shows that the educational and training requirements that are imposed on architects (protection of the title of architects) cause high costs of prevention. However, as these requirements aim at protecting clients from bad quality architects, the costs of damages for clients may be lowered. The regulation and maintenance of the protection of the title of architects by governments or national professional organisations also cause high administrative costs.

If we look at the protection of the function of architects, this regulation issue in particular causes high administrative costs for clients. In the first place, clients are not free to determine whether or not they want to engage an architect for their design activities. Clients therefore have to make costs of hiring an architect, whereas they might have preferred to design themselves

or to engage the building contractor for their design activities. This does not correspond to the trend I observed in Chapter 1 that clients want to hire professionals from other disciplines to provide a design, instead of hiring architects. So the protection of the function of architects as a market entry regulation does not match this free market development. Furthermore, the cost reduction perspective showed that a protection of function results in less external competition between architects and other service providers who may provide design activities to the client. As a result, architects may have fewer incentives to provide highly innovative designs or to control their expenses, which again causes costs of damage to the client.

Because of the high costs that are caused by this type of market entry regulation, it may be argued that, in addition to the protection of the title of architects, the protection of the architect's function is better replaced by legal requirements on quality and safety of the design, such as the requirements that have been established in the Dutch *Bouwbesluit* (Building Decree) or in the English Building Regulations (2000) as has been described in Chapter 3. Such requirements also protect safety, quality, and public order interests of clients and society in general, which was the reason in the first place for Belgian and French legislators to protect the function of architects.

The Second Regulation Issue: Architect Liability (Chapters 4 to 10)

Architects have many obligations under the design contract. In case of the non-fulfilment of (one of) these design obligations, architects can be liable towards the client. Generally, this is either strict or negligence based liability (see Chapter 4, Section 1 for the difference between these two liability systems). However, there are many nuances in this distinction as architect liability may arise from many types of legal duties; strict liability may not be that strict when we look at the specific obligations that architects have to perform under the design contract. Therefore, in Chapters 4 to 10, I compared seven specific duties of architects under the design contract to get an overview of the specific requirements for architect liability in case of the non-performance of these seven duties: the (general) duty of care, the duty to examine the building site, the duty to advise on suitable building materials, the duty to advise on applicable laws and rules, the duty to advise on construction costs, the architect's authority to act on behalf of the client, and the duty to manage and supervise the works.

This comparison showed that architect liability differs to a great extent in the European countries. Regarding the duty to examine the building site, for instance, Dutch and English architects are under an obligation of means whereas Belgian, French, and German architects are strictly liable towards the client. Basically, Dutch, German, and English architects predominantly face negligence liability. French architects, however, are mostly under an

obligation of result towards the client for the non-performance of their design duties. Belgian architects finally are somewhat in-between as they are sometimes liable under negligence and sometimes strict liability applies.

In order to try to choose whether negligence or strict liability is the best option to govern the second regulation issue of architect liability, the costs of these two regulation options were analysed in Chapter 14 by means of the cost reduction perspective of Calabresi. As I explained earlier, the costs of prevention and damages (primary costs), the costs of spreading the damages (secondary costs), and the administrative costs (tertiary costs) were examined.

Regarding the costs of prevention and damages, the cost reduction perspective showed that architects have equal prevention costs in legal systems based on strict liability and on the negligence rule. Under negligence liability, architects are induced to take precautionary measures in order to comply with the level of care that is required. But if strict liability applies, architects will also have incentives to take precautionary measures because in general they will have to bear the damage and therefore they may want to reduce this damage by taking precautions.

Furthermore, if we look at the costs of spreading the damage, the cost reduction perspective showed that if the architect is the superior risk bearer, strict liability systems may reduce the costs of spreading the damages. To determine if the architect is the superior risk bearer it is important to see whether or not architects can easily take out insurance cover so that their risks of damages are adequately covered by insurance.

Finally, both liability systems cause administrative costs. However, it may be argued that negligence liability systems cause more settlement and litigation costs than strict liability systems. After all, under strict liability courts have to determine the magnitude of the loss, whereas under the negligence rule courts in addition have to determine the level of care actually taken and calculate the socially optimal level of due care. So a negligence based liability system seems a simpler and more uncomplicated liability system, causing less litigation costs. On the other hand, strict liability will cause liability claims by clients more frequently compared to negligence liability, which also causes settlement and litigation costs.

In the following paragraphs I will summarize the most important results of the comparative part per design duty. Furthermore, I will describe where the cost reduction perspective leads to for each of these specific design duties regarding the regulation options strict or negligence liability.

The Duty of Care

As we have seen in Chapter 4, the duty of care basically implies that architects have to observe a certain standard of care while they are

performing their design duties under the design contract. The comparative analysis showed that in each of the five countries examined, architects are under an obligation of means towards the client. Generally, architects have to perform their design activity with reasonable care as has been established in general contract law (and also in principles such as the PEL SC), or the common law in England. In all countries, architects have to comply with the state of the art, which means that architects have to provide a design that complies with the state of science and technology at the time of the actual design activity. So architects are not judged by hindsight. More specific requirements that architects have to comply with have been established in case law or standard conditions (for instance in the Netherlands). In addition, in most European countries, architects may be under a higher standard than reasonable care and skill. In England, for instance, architects are under such higher standard if they are hired under a design and construct contract. Besides that, Belgian and French architects are under an obligation of result if the solidity of the works is at stake. Finally, architects and clients can individually agree that strict liability applies to the architect's design assignment.

The cost reduction perspective shows that strict liability causes less costs than negligence based liability systems. In particular, strict liability systems cause less costs of spreading the damages and administrative costs. As we have seen, the costs of prevention and damages are equal in both liability systems. Imposing architects to strict liability if they have not complied with their duty of care would have the effect that architects refrain from applying these innovative ideas or undertaking these experimental approaches, whereas these are very important to the profession (see Chapter 14, Section 3.3). In strict liability systems, experimental or innovative designs can easily lead to the liability of architects after the building is realised because often yet after several years enough experience has been gathered to be able to review them.

However, I argued that in case of *traditional* design assignments architects might be under strict liability. If architects are hired by the client to merely provide a traditional design, it is not that strange to expect architects to deliver a design that is fit for purpose. After all, in these circumstances, architects can be considered to have enough experience to provide such traditional design. According to the cost reduction perspective, architects are superior risk bearers in that situation because insurance companies will cover the risks of damages more easily in case of traditional designs than with innovative or experimental designs. So, as a result, in case of traditional design assignments, the cost reduction perspective shows that European architects can face strict liability.

The Examination of the Building Site

Usually, Dutch, Belgian, French, and English architects are under an obligation to examine the building site. The scope of this obligation has been established in case law or in the individual design contract with the client. Accordingly, architects in particular have to see that the conditions of the building site and its surroundings are fit for the designed structure. In each of the examined countries, architects can hire specialists to carry out technical activities for instance for which they lack professional skill. As we have seen with the general duty of care, Belgian and French architects are under an obligation of result if failures in the examination of the building site affect the solidity or the final purpose of the building, which seems very likely because severe damage to the building will occur when this obligation has not been duly performed by the architect. Dutch and English architects, on the other hand, are under an obligation of means. However, English clients often hire more specialised contractors, such as building inspectors or structural engineers to assist with or even carry out soil examinations. In Germany, as well, clients usually hire an engineer or technical expert to perform these soil examinations but German architects and clients may explicitly agree in the individual design contract that the architect's assignment covers the duty to examine the building site as well. In that case, German architects are under an obligation of result.

As in Belgium, France, and Germany strict liability applies if the architect has not duly performed this obligation, the comparative analysis matches with the cost reduction outcome. Dutch and English architects however, are under an obligation of means towards the client. According to the cost reduction perspective, strict liability may be the better regulation option, however, if these architects are superior risk bearers. So the question is whether or not their risk of damages due to the non-performance of this obligation to examine the building site is adequately covered by insurance. If they are able to do so, strict liability would be preferred over negligence liability.

Advise and Selection of Building Materials

Architects have the obligation to select building materials that are suitable to realise the building works. If the materials they selected for this realisation appear unsuitable, however, Dutch, Belgian, German, and English architects face negligence liability towards the client. French architects, on the other hand, are strictly liable. As French architects, Belgian architects seem also under an obligation of result if the non-performance of their duty to select building materials results in damage to the solidity of the works. We have seen this construction with other duties as well. Furthermore, in each of the

five countries I compared, architects are more easily liable towards the client if they choose to apply building materials that have not been tried or tested before. Such reasoning also applies if architects are hired to design and build the works, which often occurs in English building practice.

As I explained earlier with the general duty of care, when architects would face strict liability, problems will rise regarding innovative or experimental building materials the architect wants to apply. Furthermore, architects will have difficulties with insuring their risk of damage if they apply these experimental or innovative building materials. As a result, architects are not the superior risk bearers and the costs of spreading the damages will not be reduced then. Therefore, strict liability does not seem very suitable when architects apply innovative building materials. If architects apply traditional building materials, however, they will be considered to be familiar with these materials and their risk of damage will be easier to insure, which means that these architects are superior risk bearers. So when traditional building materials are applied a strictly based liability system for architects is possible according to the cost reduction perspective.

Advise on Applicable Laws and Rules

Generally, architects are required to observe the applicable (public and private) laws and rules, such as building regulations and the Housing Act, in order to be able to deliver a design that is fit to obtain a building license. As I explained, this is considered a minimum level of what architects are expected to observe. In each of the countries I examined, architects are strictly liable if they do not comply with this obligation. In Germany, even stronger, architects have to guarantee that the design they provide complies with the *anerkannten Regeln der Technik und Baukunst*, which is a minimum standard. However, it should be taken into account that often legal obstructions occur that prevent that a building license is being granted for the design. In particular, in the Netherlands and Germany it has been established that in case of legal obstructions that may prevent the design from obtaining a building license, architects are just under an obligation of means to try to get an exemption so that the building license can yet be obtained. Architects can therefore not be expected to guarantee that the design they provide is eligible to obtain a building license. In this respect, architects can only be under an obligation of means, as follows from the comparative part.

Basically, the comparative analysis matches with the outcome of the cost reduction perspective. However, it should be taken into account that often legal obstructions occur that prevent that a building license is being granted for the design. In the Netherlands and Germany it has therefore been

established that, in case of legal obstructions that may prevent the design from obtaining a building license, architects are just under an obligation of means to try to get an exemption so that the building license can be obtained; they can not be expected to guarantee that the design they provide is eligible to obtain a building license. Now that the cost reduction perspective shows that strict liability would yet be the cheaper option, it can be argued, however, that architects are superior risk bearers if they are adequately covered by insurance. However, it seems difficult to insure the risk of damages caused by not obtaining a building license.

Advise on Construction Costs

The next duty I examined in the comparative part is the duty to advise the client on the construction costs of the project. Basically, architects can at best be expected to estimate the construction costs as accurately as possible ('approximately'). Generally, architects are not allowed to exceed the cost estimation that was agreed upon with the client. However, in most countries, certain margins exist as it would be unfeasible for architects to provide 100 % precise cost estimations. As explained in the comparative part, another difficulty with this obligation is that architects largely depend on the service performances of other building participants such as technical engineers and building contractors. Architects have to take into account the performances of these other contractors as well.

As a result, European architects basically face negligence liability. According to the cost reduction analysis however, strict liability would be the better option. Firstly, under strict liability architects would have less litigation and settlement costs than if negligence liability applies. After all, under negligence liability courts have to establish the level of care actually taken and calculate the socially optimal level of due care. As we have seen, this is a time- and cost consuming task. Secondly, under strict liability architects are superior risk bearers if they are covered by insurance. It is common knowledge in construction law that the construction costs are frequently exceeded. Therefore, architects shall be willing to take out professional liability insurance and shift the risk to damages to an insurance company. This may reduce the costs of spreading the damage even more.

Architect's Authority to Act on behalf of the Client

Dutch, Belgian, German, and English clients usually give the architect express authority to act on behalf of them during the realisation of the building works. The exact scope of what the architect is or is not allowed to do on behalf of the client has been determined in the individual design contract that applies to the assignment. The Dutch and Belgian laws and

rules are very much alike; basically, architects have to represent the client at the tender of the works, which means that they have to inform the applicants about the building works and have to draft a concept construction contract. However, in both countries, architects are not allowed to actually allocate the works to one of the applicant building contractors. Neither are they allowed to accept the works of the building contractor as these activities are exclusively kept for the client. In case of misrepresentation of the client's interests by architects, clients may claim damages. If clients allow or (in Belgium) approve the architect's performances on behalf of misrepresentation they can not claim damages, however. If the client has given the building contractor the idea that the architect was allowed to represent the client whereas in fact he was not, the client is bound towards the building contractor to pay for his expenses and he will not be entitled to claim damages from the architect. However, if the architect was authorized to act on behalf of the client but exceeded the client's authority (misrepresentation), the client may as well be bound towards the building contractor but may take recourse against the architect. This is different if the client has given the architect the idea that he was authorized to act on behalf of him.

In Germany, case law has established that the *Architektenvollmacht* has a limited scope; mostly, German architects are hired to prepare and assist the client at the allocation of the works. As in the Netherlands and Belgium, they are not allowed to actually accept the works as this is an explicit obligation of the client. In case of misrepresentation, German architects are liable unless the client knew and allowed the misrepresentation (*Duldungsvollmacht*) or did not know of the misrepresentation but acted as if he knew (*Anscheinsvollmacht*).

In England, it is quite common for architects to have express powers to act on behalf of the client during the course of the carrying out of the building works. Different from the other countries examined, English architects also have express authority to act as certifier, which means providing a written confirmation that the building contractor has complied with the contract specifications after which the building contractor is entitled to payment. In this respect, English architects have to act as impartial middlemen between the client and the building contractor.

Opposite to the other four countries examined, in France it is not common that architects are under an obligation to act on behalf of the client. This is because French architects are merely hired to assist and advise the client instead of explicitly act on behalf of them. This obligation to assist and advise particularly implies that they have to inspect the works before the actual reception takes place. However, as in the other countries, in the individual design contract, architects and clients can agree that the architect has certain representation powers. In that case, French architects merely

distribute information between the client and the building contractor during the realisation of the building works. Sometimes, they are given authority to coordinate the realisation of the works and to control whether the realisation of the works by the building contractor is in conformity with the architect's design.

The comparative analysis in Chapter 9 showed that, in all countries, architects are strictly liable towards the client if they exceed the scope of this authority or if they act on behalf of the client whereas they lack the client's authority to do so. So architects are under an obligation of result, which means that they can not just 'do their best' if they act on behalf of the client. The comparative analysis and the cost reduction outcome therefore match. However, if we look at the costs of spreading the damage (secondary costs) it seems difficult to determine who the superior risk bearer is as often three contracting parties are involved in liability issues that relate to the non-performance of this obligation.

Management and Supervision

Generally, the comparative analysis shows that European architects are hired to perform both supervisory as well as managing obligations. However, sometimes architects are hired merely to perform a certain degree of supervision at the building activities. Regarding their duty to supervise the building works, architects are under comparable obligations in the countries that were examined. Basically, they have to check whether the building activities are being performed in conformity with the design, the building specifications, and the time limits that were agreed. The exact scope of the architect's supervision is determined by the nature and size of the works. When architects are also hired to manage the building works, their most important obligation is to give the building contractor instructions during the construction. This obligation is closely linked to the architect's duty to represent the client. After all, architects who have to give instructions to the building contractor often represent the client in this respect.

Overall, architects are under an obligation of means when they perform these supervision or management duties. This has been particularly established in national case law. However, according to the cost reduction perspective, strict liability would be the cheaper regulation option. In this respect it can be argued that the client is the superior risk bearer. This is because clients can often claim damages from the building contractor (instead of the architect) for not duly performing his obligation to carry out the construction works. So if strict liability applies the costs of spreading the damages would be reduced to a great extent.

The Third Regulation Issue: Limitation of Architect Liability (Chapter 11)

So architects can be liable (either strictly or for negligence) towards the client for the non-performance of (one of) their design duties. In some countries, architects are allowed to limit this liability. The examination of this third regulation issue in the five European countries showed that there are two major options to do so; architect liability can be contractually limited (regarding the liability period and extent) by architects, as is often done in standard conditions, or architects can limit their liability towards the client by performing their professional activities in a private company with limited liability.

Regarding the first option (contractual limitation of architect liability), in the Netherlands, often clauses occur in the commonly applied standard conditions that limit the *period of time* of architect liability. In Germany, clauses limiting the liability period that applies to architects are allowed as well (often these are included in *Einheitsverträgen* or *vorformulierten Verträgen*). In England, however, architects are not allowed to limit the liability periods that apply to them on behalf of the Limitation Act 1980 and the Latent Damages Act 1986. In Belgium and France, finally, contractual clauses that limit the liability period of architects in theory are allowed. However, these clauses are forbidden if they try to limit the ten-year liability period for damages that flow from Article 1792 (severe damages to the building itself that affect the solidity of the works). This is because this ten-year liability period has been established because of public order interests and any limitations of this period would interfere with that consideration. So, in practice, these exclusion clauses are void and therefore have no effect on the period of architect liability that applies to Belgian and French architects.

As to contractual clauses that limit the *extent* of architect liability, both in the Netherlands and in England it is common to apply such clauses for architects as they often occur in standard conditions. In Germany, the BGB allows architects to apply *Individualvereinbarungen* but many restrictions as to the application of these clauses have been formulated in the BGB as well. In Belgium and France, clauses that limit the extent of the architect's liability are not commonly applied. In Belgium, such clauses are not allowed because of Article 4 *Architectenwet* that establishes the obligatory intervention of architects for design activities of the client. Allowing clauses that limit the extent of the architect's liability would be contradictory then. In France, a similar rule has been established: individual contract terms may be allowed unless they try to limit the liability of architects for damages that flow from Article 1792 *Code Civil*.

Regarding the second option of this regulation issue (limitation of personal liability), the comparison showed that, in all countries that were

examined, architects are nowadays allowed to perform their professional activities in a private company with limited liability. As a result, they are not personally liable towards the client. As detailed explained, in Belgium, this rule has only been recently established as a result of a research report (CEA Belgium 2004) according to which Belgian architects appeared outsiders in Europe at this point. In 2007, the *Laruelle Wet* came into being. As a result, Belgian architects are allowed to limit their personal liability towards the client as well now.

According to the cost reduction analysis, architects who contractually limit their liability have similar costs of damage than architects who limit their liability by performing their professional activities in a private company with limited liability. In both options, architects and clients have considerable costs of damage because architects will not be liable at all towards the client or to a lesser extent. However, contrary to the limitation of architect liability in a private company with limited liability, the contractual limitation of architect liability above all causes drafting, negotiation, and litigation costs for architects and clients. Therefore, according to the cost reduction theory of Calabresi, limiting architect liability in a private company with limited liability is the cheaper regulation option.

The Fourth Regulation Issue: Professional Liability Insurance (Chapter 12)

Generally, architects may either be under a legal obligation to take out professional liability insurance, or they may be free to determine their liability insurance cover. In legal systems where architects are obliged to take out professional liability insurance, they may attract more claims from clients as they have deep pockets and are thus able to compensate loss, possibly even more so than other participants in the building process.

In Chapter 12, I examined this fourth regulation issue and explained whether architects are under an obligation to take out professional liability insurance. If yes, I examined the reasons for establishing such obligation, it's (legal) basis, and the types of insurance that are commonly taken out by architects. In four of the five countries examined, architects are under an obligation to take out professional liability insurance. Sometimes this obligation is based on the law, for instance in Belgium and France. Sometimes this obligation follows from the architect's registration of his title at a registration board. In Germany and England, for instance, architects are not obliged by law to take out liability insurance but if they want to carry the title of architect and perform design activities under that title, they have to register and are thus required to take out liability insurance.

Only Dutch architects are not obliged to take out professional liability insurance. However, they are covered by liability insurance for the most part, because of the applicability of standard conditions to the design

assignment with the client, however. Moreover, architects who are member of the BNA are required to take out professional liability insurance as well. Nevertheless, Dutch architects seem not to comply with the Bolkestein Directive.

A final important consideration regarding the professional liability insurance of architects is that building contractors are often obliged to take out professional liability insurance as well. In the Netherlands and England, such obligation has been established in standard conditions. In France, this even is a legal obligation. Belgian and German building contractors up till now are not obliged to take out professional liability insurance however.

According to the cost reduction theory of Calabresi, mandatory liability insurance, which applies to Belgian, French, German, and English architects, is an expensive system for both architects and clients. In particular, architects have to take out professional liability insurance which causes administrative costs. Architects will try to pass these costs on to the client, which may imply that clients have to pay higher design prices. Furthermore, clients seem to have costs of damage, because architects may have less incentives to prevent damage if they are mandatory covered by liability insurance. Moreover, architects may tend to take less precautions than in the situation that they would not be covered by liability insurance (moral hazard).

Therefore, it may be argued that the mandatory liability insurance system that applies to Belgian, French, German, and English architects may better be replaced by another insurance system which focuses more on which party is the superior risk bearer. Such insurance system may reduce the costs that are caused by mandatory liability insurance. For instance, risk-neutral architects may be superior risk bearers, because they may be able to bear the risk of damage themselves at lower costs than the costs that are caused by shifting this risk of damages to an insurance company. Furthermore, clients or building contractors may be superior risk bearers if they can take out liability insurance at cheaper costs than the architect (for instance by means of taking out first-party insurance) or if they can better or at lower costs take precautionary measures than the architect.

Towards a New Design?

In Chapter 1, I formulated the research question of this study; *which combination of regulation options on market entry, architect liability, limitation of architect liability, and insurance is optimal in view of the European architect's and client's legitimate interests*. The four regulation issues I identified in this study have been compared within five European countries. This comparison may have provided new insights into the differences and difficulties of national rule makers in governing market entry regulation, architect liability,

limitation of architect liability, and professional liability insurance. Furthermore, this comparison has lead to eight regulation options, two regulation options per regulation issue, that are most applied by national rule makers to deal with the four regulation issues I identified. I applied Calabresi's cost reduction perspective to further analyse which of these regulation options is the 'best option' to deal with the tensions in European architect law I observed. While doing that, I focussed on the costs that are caused by these regulation options. The cost reduction analysis may provide starting-points from the law and economics perspective that may contribute to the discussion on a new design for European architect law. Obviously, these starting-points need further reflection and examination, in particular from a law and economic point of view. However my research leads to four interesting insights. Accordingly, it may be argued that;

(i) Because of the high costs that are caused by this type of market entry regulation, it may be argued that the protection of the architect's function may better be replaced by legal requirements establishing the quality and safety of designs and aiming at protecting the interest of clients in particular and society in general. As we have seen in this study, the protection of the function of architects in particular causes high administrative costs (of hiring an architect) for clients. This does not correspond to the trend I observed in Chapter 1 that clients want to hire professionals from other disciplines to provide a design, instead of hiring architects (free market development);

(ii) Although the results from the comparative analysis in Chapters 4 to 10 show that European architects predominantly face negligence liability when they perform their design duties towards the client, the cost reduction perspective in Chapter 14 clearly shows that strict liability is the cheaper regulation option as it causes less costs of spreading the damages and less administrative costs than legal systems that are based on the negligence rule. In this final chapter I provide insights into whether this outcome (strict liability) would indeed be preferable as the leading liability rule for the seven design duties I compared in this study. This resulted in the following observation.
For the duty of care and the duty to select building materials, I distinguished between traditional and innovative designs or materials. In case of traditional designs or building materials strict liability is the best option according to the cost reduction perspective.

Regarding the obligations to examine the building site and to act on behalf of the client I argued that strict liability is the cheaper option if the architect can adequately insure his risk of damages.

If we look at the architect's obligation to observe applicable laws and rules, the comparative analysis showed that architects are strictly liable

basically but they can not be expected to guarantee that the design they provide is eligible to obtain a building license. According to the cost reduction perspective, if architects are adequately covered by insurance they are superior risk bearers and strict liability would be the better option. But this seems difficult as it will be hard to insure the risk of damages caused by not obtaining a building license.

Regarding the architect's duty to advise the client on the construction costs of the project, architects basically face negligence liability. However, according to the cost reduction analysis strict liability would be the better option. Architects would have less litigation and settlement costs and architects shall be willing to take out professional liability insurance and shift the risk to damages to an insurance company because construction costs are frequently exceeded. However, in practice, it seems difficult to operate strict liability. As I explained in Chapters 8 and 14, architects can not be expected to estimate the construction costs 100 % accurate.

If architects are under an obligation to act on behalf of the client, they are strictly liable towards him if they exceed the scope of this authority. They can not just 'do their best' if they act on behalf of the client. The comparative analysis and the cost reduction outcome therefore match. However, if we look at the costs of spreading the damage (secondary costs) it seems difficult to determine who the superior risk bearer is as often three contracting parties are involved in liability issues that relate to the non-performance of this obligation.

Finally, I argued that, regarding the architect's duty to manage and supervise the works, the client is the superior risk bearer because clients can often claim damages from the building contractor (instead of the architect) for not duly performing his obligation to carry out the construction works. So if strict liability would apply (instead of negligence) the costs of spreading the damages would be reduced to a great extent;

(iii) Limiting architect liability in a private company with limited liability is a cheaper regulation option for architects and clients than limiting architect liability in standard conditions. Architects who contractually limit their liability have similar costs of damage than architects who limit their liability by performing their professional activities in a private company with limited liability. In both options, architects and clients have considerable costs of damage because architects will not be liable at all towards the client or liable to a lesser extent. However, the contractual limitation of architect liability above all causes drafting, negotiation, and litigation costs for architects and clients.

(iv) An insurance system that focuses more on which party is the superior risk bearer seems optimal in view of the architect's and client's interests as it

seems to reduce the costs caused by mandatory liability insurance. There are two options that need future investigation. Firstly, risk-neutral architects may be superior risk bearers, because they may be able to bear the risk of damage themselves at lower costs than the costs that are caused by shifting this risk of damages to an insurance company. Secondly, the client or the building contractor may be superior risk bearers if they can take out liability insurance at cheaper costs than the architect (for instance by means of taking out first-party insurance) or if they can better or at lower costs take precautionary measures than the architect.

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